

HEINONLINE

Citation: 10 N.Y.U. J. Legis. & Pub. Pol'y 133 2006-2007

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Sun Apr 28 02:13:33 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1094-513X](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1094-513X)

TRAPPED BY PRECINCTS? THE HELP AMERICA VOTE ACT'S PROVISIONAL BALLOTS AND THE PROBLEM OF PRECINCTS

Leonard Shambon[†]

Keith Abouchar^{*‡}

I. Introduction	134
II. Defining Precinct.....	137
A. Differentiating "Precinct," "Polling Place," and "Jurisdictions"	137
B. The Development and Purpose of Precincts	140
C. Current Precinct Structure	143
D. Criticisms of the Precinct Structure	157
III. Provisional Voting: The Idea and its Implementation ..	158
A. Pre-HAVA Studies	159
B. HAVA	160
1. The House Version.....	162
2. The Senate Bill	163
3. The Conference Bill.....	164
C. The 2004 Pre-Election Litigation Over the Provision's Meaning	166
D. The EAC's Survey of Provisional Ballot Casting and Counting in 2004	175
IV. From Provisional Ballot to Actual Vote: Lessening the Friction Between Jurisdictions, Polling Places, and Precincts.....	178
A. Where the Courts Went Wrong	178

[†] Consultant to the then-ranking member of the House Committee on House Administration, Congressman Steny H. Hoyer, for the House-Senate Conference on the Help America Vote Act.

^{*} Senior Policy Advisor to House Majority Leader Steny H. Hoyer. Since 2001, he has been the principal staff advisor for election reform to Congressman Hoyer.

[‡] The analysis and opinions contained in this article are solely the private views of the authors and are not to be construed as official or reflecting the views of any other person or organization.

B. Options for Improving Efficiency at the Precinct Level	182
C. Vote Centers: A Possible Solution to the Problem of Precincts	183
1. The Success of Vote Centers in Larimer County	183
2. Cost Concerns	186
V. Conclusion	190

I.

INTRODUCTION

In a nation where sequels have become mainstays of our culture, the 2004 election picked up where the controversial 2000 election left off. Indeed, almost from the moment the United States Supreme Court issued *Bush v. Gore*¹ at 10 p.m. on December 12, 2000²—ending thirty-five days of uncertainty that exposed the ugly secret that the nation’s electoral infrastructure was not up to the task of handling a close election—the 2004 election became the rallying call for the two major political parties. On one side, lingering doubts that President Bush had been the legitimate winner in 2000 presented a challenge for Republicans.³ On the other, upset Democrats vowed to focus on ballot-counting reforms, to avoid the problems encountered in Florida four years earlier.⁴ In between the two were state and local election administrators, whose principal concern was not which party triumphed but preventing the specter of Florida from visiting their states.⁵

In response to the 2000 election, Congress enacted the Help America Vote Act of 2002 (HAVA).⁶ HAVA is a comprehensive piece of legislation designed to address the well-recognized need for reform. HAVA was intended to correct core deficiencies in the American electoral process by introducing: (1) truly statewide voter regis-

1. 531 U.S. 98 (2000) (per curiam).

2. See HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* 140 (2001).

3. See John M. Broder, *Imagining the Danger of 2000 Redux*, N.Y. TIMES, Oct. 17, 2004, § 4, at 1.

4. See Karen Branch-Brioso, *Floridians Aim to Avoid Repeat of 2000*, ST. LOUIS POST-DISPATCH, Oct. 30, 2004, at 22; John Whitesides, *Democrats Revisit Their Waterloo*, PHILA. INQUIRER, Dec. 7, 2003, at A10.

5. See Michael Moss & Alexis Rehrmann, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES, Sept. 13, 2004, at A1 (discussing concerns over administration and counting of absentee ballots).

6. Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

tration databases (required in all states by January 1, 2006⁷) to streamline the registration process and improve registration list accuracy; and (2) provisional voting (required in all states by January 1, 2004⁸).⁹ Provisional voting is meant to ensure that no one whose right to vote had been questioned will exit a polling place without having at least cast a conditional ballot; once the voter's eligibility is authenticated, that ballot will be counted.¹⁰ HAVA mandated provisional balloting to ensure that neither haste, clerical errors, nor poor notification of precinct boundaries and polling locations on election day would cause widespread disenfranchisement of eligible voters.¹¹

Like many sequels, the 2004 election did not bring a neat and tidy resolution to all of the issues that surfaced in 2000. A hard-fought campaign—marked by intense distrust, record spending, and enormous get-out-the-vote efforts—yielded a spate of pre-election and election-day litigation¹² and general despair about our election day processes. While the Democratic presidential nominee quickly accepted the election result as legitimate,¹³ the erosion of confidence in our election administration continued. Given the closeness of the election and the fevered support for each candidate,¹⁴ the post-election reaction was not surprising. Bad feelings were not as conspicuous as

7. Help America Vote Act (HAVA) § 303(d)(1)(A)-(B), 42 U.S.C. § 15483(d)(1)(A)-(B) (Supp. III 2005). The effective date for the statewide voter registration list was January 1, 2004, but states could receive an extension to January 1, 2006 if they had good cause for their inability to meet the 2004 deadline. *Id.*

8. § 302(d).

9. See 148 CONG. REC. S710 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd). Sen. Dodd also mentions implementing voting system standards ensuring that blind and disabled persons and language minority citizens can cast votes “privately and independently.” For further discussion of HAVA’s provision regarding language minority citizens, see James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 195, 200–29 (2007).

10. See NAT’L TASK FORCE ON ELECTION REFORM, NAT’L ASS’N OF ELECTION OFFICIALS, ELECTION 2000: REVIEW AND RECOMMENDATIONS BY THE NATION’S ELECTIONS ADMINISTRATORS 52 (2001), available at <http://www.electioncenter.org/publications/electionrefortreport2001.pdf> [hereinafter NAT’L TASK FORCE ON ELECTION REFORM 2000]; Robert Pear, *Bush Signs Legislation Intended to End Voting Disputes*, N.Y. TIMES, Oct. 30, 2002, at A22.

11. See H.R. REP. NO. 107-329, pt. 1, at 38 (2001). See also *infra* Part IV.B.1.

12. See *infra* Part V.

13. See Dan Balz, *Bush Wins Second Term; Kerry Concedes Defeat; Both Speak of Need for Unity*, WASH. POST, Nov. 4, 2004, at A1.

14. See James E. Campbell, *The Presidential Election of 2004: The Fundamentals and the Campaign*, FORUM, Dec. 2004, at 1, 1 (noting that the 2004 presidential election “ranks in the top tier of closely decided elections in American electoral history” and calling political polarization “the defining feature of recent American politics”).

they had been in 2000, but the public's negative perceptions of the way we run elections were becoming increasingly ingrained.

The states did implement provisional ballot regimes in time for the 2004 election.¹⁵ However, to the disappointment of many who anticipated that this requirement would serve as a uniform fail-safe mechanism for voters, provisional ballots were at best a partial success in 2004. A major problem was that some states and localities refused to count provisional ballots cast outside the precinct in which the voter was registered;¹⁶ the national rate for counting provisional ballots was 64.5%.¹⁷ The second most-cited reason for not accepting a provisional ballot was that the ballot had been cast in the wrong precinct.¹⁸

We believe that much of the dissatisfaction stems from two closely related sources: the methods by which election jurisdictions determine where eligible voters are to vote, and what happens when eligible voters show up in the wrong polling location. We believe that if the states hew to the underlying purpose of HAVA's provisional ballot requirement, eliminate restrictions on out-of-precinct voting for federal races, and rationalize their respective precinct structures, they will make major advances toward reducing the structural frictions that foster the voter frustration that first boiled to the surface in 2000. Building a more harmonious geographical structure will significantly reduce that voter frustration.

In Part II, we discuss the relationship between the three geographical building blocks: polling places, precincts, and jurisdictions. We focus on the historical development of precincts, their current structure, and criticisms of precincts as structures. Part III discusses the call for provisional voting, the legislative history of the HAVA provision, and the litigation surrounding the provision in the months before the 2004 election. This part also summarizes the United States Election Assistance Commission's survey analysis of the effectiveness of provisional ballots in that election. And in Part IV, we suggest a variety of solutions for the structural friction. We conclude with final thoughts in Part V.

15. See ELECTIONLINE.ORG, BRIEFING: SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004, 3 (2005), <http://www.electionline.org/Portals/1/Publications/ERIP10Apr05.pdf>.

16. See *id.* at 6, 12 tbl.4.

17. See U.S. ELECTION ASSISTANCE COMM'N, FINAL REPORT OF THE 2004 ELECTION DAY SURVEY, Provisional Ballots 6-5 (2005), http://www.eac.gov/election_survey_2004/pdf/EDS-Full_Report_wTables.pdf [hereinafter EAC SURVEY].

18. See *id.* Overall, the most-cited reason for rejecting a provisional ballot was that the voter was not registered in any precinct. *Id.* See also *infra* note 221 and accompanying text.

II.

DEFINING PRECINCT

A. *Differentiating "Precinct," "Polling Place,"
and "Jurisdictions"*

It is the frictional interplay of the three geographical building blocks of voting—jurisdictions, precincts, and polling place—that unfairly disenfranchises a large number of eligible voters. There is, however, substantial statutory support for counting out-of-precinct provisional ballots. The analysis hinges on the word “jurisdiction” appearing in HAVA §§ 302(a) and 302(a)(2)(A), as well as the pivotal provision that became (without using the word “jurisdiction”) section 302(a)(4).¹⁹ The questions to be answered are: (1) what is a “jurisdiction” and (2) why was the word “jurisdiction” in an earlier version of section 302(a)(4) eliminated from the final version of the statute?²⁰

Answering these questions depends on one’s method of statutory interpretation. William Eskridge, Philip Frickey, and Elizabeth Garrett describe the Supreme Court’s statutory interpretation standard over the past century as “the soft plain meaning rule”—that “plain meaning can be overcome by compelling evidence of a contrary legislative intent.”²¹ Therefore, analysis of the plain meaning alone is insufficient, as thorough interpretation also requires weighing the plain meaning against the legislative history.²² For the textual examination, there are a number of commonly used interpretive rules, including using the ordinary meanings of words (frequently by resort to dictionaries), avoiding absurd results, interpreting individual provisions so as not to undercut or render redundant another provision of the same statute, and construing similar statutes in a similar manner.²³

Central to the meaning of “jurisdiction” are its relationships to the terms “polling place” and “precinct.” While section 302(a) expressly uses the term “jurisdiction,” it never uses the word “precinct.”

19. Section 302(a)(4) reads: “If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.”

20. See *infra* notes 118–20 and accompanying text (discussing deletion of the phrase “in the jurisdiction” between the Senate bill and the bill adopted by the conference committee).

21. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 231–33 (2d ed. 2006).

22. *Id.* at 232.

23. *Id.* at 236, 243–44; see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23–29 (1997) (discussing textualism and canons of statutory interpretation).

So what is a “precinct,” and should its meaning control the effectiveness of HAVA’s provisional ballot requirement or, more importantly, an eligible voter’s right to vote? A survey of state laws shows that “precinct” and “polling place” are closely related to one another.²⁴ Polling places are the *physical locations* where voters go to cast their votes, or, if circumstances require, their provisional ballots;²⁵ precincts are the *geographical political units* for grouping residents for the purpose of assigning them to a polling place.²⁶ In almost no instance is a precinct an entity with a separate political representative or with an actual staff of governmental officials other than on election day. It is subsidiary to a jurisdiction and, indeed, defined by the government entities in charge of the jurisdiction.²⁷

The term “polling place”—describing the location where a list of eligible voters are to vote—is employed in section 302(a) in a manner that, although not synonymous with “precinct,” bears a close resemblance to it. To be sure, this can only be inferred from the text, because HAVA neither defines these terms nor describes how they relate to one another. Nonetheless, it is clear that “jurisdiction” denotes a larger government administrative entity than “polling place,” and that a polling place is a part of a jurisdiction. HAVA’s assigned responsibilities to jurisdictions demonstrate that a jurisdiction is a regularly functioning unit of government that contains actors with day-to-day responsibility for election administration and occupies a place somewhere between the state and the polling place.²⁸ “Polling place,” more specifically, is used throughout the statute to refer to particular physical locations where voting takes place, not to a unit of government.²⁹

24. See, e.g., GA CODE ANN. § 21-2-2(28) (2006); 10 ILL. COMP. STAT. 5/1-3(13); MICH. COMP. LAWS ANN. § 168.654 (West 2005); NEB. REV. STAT. § 32-114 (2005); OHIO REV. CODE ANN. § 3501.01(Q) (West 2006); 25 PA. STAT. ANN. § 2602(g) (2006); TENN. CODE ANN. § 2-1-104(18) (2005); VA. CODE ANN. § 24.2-101 (2003).

25. See, e.g., OHIO REV. CODE ANN. § 3501.01(R) (West 1994) (defining “polling place”).

26. See, e.g., OHIO REV. CODE ANN. § 3501.01(Q) (West 1994) (defining “precinct”).

27. See *id.*

28. See, e.g., HAVA § 303(d)(1)(B), 42 U.S.C. § 15483(d)(1)(B) (Supp. III 2005) (“State or jurisdiction” may apply to federal Election Assistance Commission for waiver of certain effective dates); § 301(c) (“State or jurisdiction” not prohibited from using certain voting systems); § 302(d) (each “State and jurisdiction” must comply with provisional balloting provisions by January 1, 2004); § 303(b)(1)(A) (procedures for those “register[ing] to vote in a jurisdiction” by mail); § 303(b)(1)(B)(ii) (procedures for voters casting their ballots for the first time in “an election in the jurisdiction”); § 254(c)(2) (criminal liability for “State or other jurisdiction”).

29. See, e.g., § 241(b)(5) (accessibility of “polling places”); § 241(b)(18) (information on “location or time of operation of a polling place”).

A plain reading of the entire statute is consistent with this hierarchy, with the state sitting at the top, polling place occupying the bottom, and jurisdiction somewhere in the middle. Thus, there is intra-textual consistency.³⁰

Should there be *inter-textual* consistency as well? As the courts' varied interpretations of the statute show,³¹ the answer is yes. The most analogous federal voting statute is the National Voter Registration Act of 1993 (NVRA), which regulates other aspects of federal election administration.³² The NVRA explicitly equates a "registrar's jurisdiction" with the political unit of government that maintains voter registration.³³ But at least one court rejected the applicability of the NVRA's definition of jurisdiction to the term as it appears in HAVA, finding no "compelling reason" to do so.³⁴

The question of inter-textual consistency is compounded by the fact that, unlike other forms of legislation, modern federal regulation of elections has been an episodic, infrequent, and evolving process. It began in earnest with the Voting Rights Act in 1965³⁵ (and its expansion in 1975³⁶), the enactment of the Uniformed and Overseas Citizens Absentee Voting Act in 1986,³⁷ the NVRA in 1993, and finally HAVA in 2002. In this unusually sensitive area of law, the NVRA is highly relevant to understanding HAVA. It seems that seldom does Congress amend preexisting voting statutes to address new challenges, as often happens with legislation in other areas. Rather, it would appear that voting statutes are more typically complemented by later statutes.³⁸ Considering all voting statutes collectively is thus essential

30. See generally ESKRIDGE, FRICKEY & GARRETT, *supra* note 21, at 272, 291–92 ("the preferred meaning of a provision is the one consistent with the rest of the statute and statutory scheme").

31. See *infra* Part V.

32. 42 U.S.C. §§ 1973gg to gg-10 (2000).

33. See § 1973gg-6(j).

34. See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574–75 & n.4 (6th Cir. 2004).

35. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

36. Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

37. Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 42 U.S.C. §§ 1973ff to ff-6 (2000)).

38. In contrast, an example of a federal voting statute itself that has been amended is the Voting Rights Act of 1965, whose central purpose—enforcing the Fifteenth Amendment and eliminating discriminatory election practices—has remained constant since 1965 but has been extended to include, most notably, language minority citizens. See Pub. L. No. 94-73, 89 Stat. 400, 401–02 (1975) (codified as amended at 42 U.S.C. § 1973b(f) (2000)); Tucker, *supra* note 9, at 207–11, 214–22 (describing evolution of the Voting Rights Act's application to language minority citizens).

in interpreting any one of them. Given that the NVRA contains the only congressional attempt to elaborate on the meaning of “jurisdiction,” courts should not interpret HAVA’s later draftsmanship as equivalent with congressional intent for a contradictory meaning. But here, incorporation of the NVRA definition, while most helpful to understanding section 302(a), is not essential. Recognition that “jurisdiction” is something geographically bigger than a precinct, and more governmental in nature, is enough.

B. The Development and Purpose of Precincts

Before determining the correct interpretation of HAVA regarding out-of-precinct provisional balloting, we must address whether the existing structure of precincts can be justified on its own terms, irrespective of the availability of provisional ballots. Precincts were initially created to make voting easier for voters,³⁹ but the current manner of defining and delineating precincts may have turned that justification on its head by replacing it with a standard that values ease for election administrators. The lack of public debate as to how to define precincts, without unwittingly creating barriers to voters, has contributed to arbitrary and conflicting notions of how to define precincts.

At the beginning of the country’s history, most voters had to travel to their county seats to vote (except in New England, where voting was organized on a township basis).⁴⁰ To travel to the county seat could require traveling ten to twenty-five miles.⁴¹ As early as 1748, Orange County, New York established two polling places because of the difficulty of crossing the mountains that intersected the county.⁴² Similar travel concerns induced Pennsylvania to subdivide counties into districts and to provide separate polling places for each district.⁴³ After the Revolution began, individual states continued to create multiple voting sites within counties. In 1778, New York made voting more convenient by declaring that voting would occur “not by counties but by boroughs, towns, manors, districts, and precincts.”⁴⁴ New Jersey, which had only one voting site per county before 1776,

39. See discussion *infra* Part III.A.

40. ROBERT J. DINKIN, *VOTING IN REVOLUTIONARY AMERICA: A STUDY OF ELECTIONS IN THE ORIGINAL THIRTEEN STATES, 1776–1789*, at 96–98, 133 (1982).

41. *Id.* at 97.

42. Cortlandt F. Bishop, *History of Elections in the American Colonies*, in 3 *STUDIES IN HISTORY, ECONOMICS & PUBLIC LAW* 1, 109 (Univ. Faculty of Pol. Sci. of Columbia Coll. ed., 1893).

43. See *id.* at 172.

44. DINKIN, *supra* note 40, at 97.

had fifty-three for its thirteen counties by 1788.⁴⁵ Similarly, by 1785, Pennsylvania had fifty-two voting sites for its eleven counties.⁴⁶

Use of residency within a precinct itself was a constraint on voting. In 1860 there were thirty-four states, but only three—Kentucky, Minnesota, and Pennsylvania—had minimum residence requirements for “election districts” below the county, town, or parish level.⁴⁷ Other states had precinct structures, but not residence requirements, and even mechanisms for voting out-of-precinct. Specifically, quoting from the records of contested congressional elections, Richard Bensel reported that, in many states, people could still vote in state races, such as for governor, if they were temporarily outside of their precinct, but could vote in all races if within their home precinct.⁴⁸ So, for example, “[i]f he were still within his home congressional district, he could also vote for congressman, and so forth.”⁴⁹

Compounding the operational role of precincts was the evolution of voter registration. While it began as early as 1800 in Massachusetts⁵⁰ and shortly thereafter in other New England states,⁵¹ most states did not develop registration systems until after the Civil War.⁵² Before the 1870s, “men who sought to vote were not obliged to take any steps to establish their eligibility prior to election day. They simply showed up at the polls with whatever documentary proofs (or witnesses) that might be necessary.”⁵³ But after the Civil War, election fraud became common, and the individual states concluded that regis-

45. *Id.* at 97. Nevertheless, the precinct polling place was not always convenient. Richard Bensel noted that the polling place in one New Mexico precinct was apparently chosen because it was in the exact center of the precinct—even though no one lived within two and a half miles and the site had no buildings. A shed had to be built to hold the election. RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 207 (2004).

46. DINKIN, *supra* note 40, at 97.

47. See KIRK H. PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 148 tbl.III (Greenwood Press 1969) (1918). These residency requirements were low, however: Kentucky required residency of sixty days, Minnesota thirty, and Pennsylvania ten. *Id.*

48. BENSEL, *supra* note 45, at 166–67.

49. *Id.*

50. JOSEPH P. HARRIS, *REGISTRATION OF VOTERS IN THE UNITED STATES* 65 & n.1 (Inst. for Gov't Research, Studies in Admin. Study No. 23, 1929) [hereinafter HARRIS, *REGISTRATION OF VOTERS*] (*citing* Acts and Laws of Massachusetts, 1800, Ch. 74). See also ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 65 (2000) (noting that concern about transients spurred early interest in formal systems of voter registration).

51. See HARRIS, *REGISTRATION OF VOTERS*, *supra* note 50, at 65.

52. *Id.* at 72; KEYSSAR, *supra* note 50, at 151–52.

53. KEYSSAR, *supra* note 50, at 151.

tration had become a necessity.⁵⁴ By World War I, most states had adopted formal voter registration systems⁵⁵ to reduce fraud and conflicts at the polls on election day.

As registration systems became a fixture of election administration, some communities, concerned about rising fraud, opted for the registration process to be conducted periodically at the precinct level, where "the precinct election board was a law unto itself," rather than have permanent registration.⁵⁶ The periodic requirement to re-register all voters was designed to completely clean the register of people who had moved or died.⁵⁷ The results often fell short of expectations, however, because precinct boards failed to purge the lists of such changes adequately⁵⁸ and also because, in an environment of uncoordinated precinct-based lists, the lists could easily be padded by organized squads traveling from precinct to precinct to register.⁵⁹ Not surprisingly, fraudulent voting remained relatively easy, particularly since many states had not yet adopted signature verification of voters at the polls to permit positive identification of each voter.⁶⁰

To cure the failings of periodic precinct-based registration, many states moved to permanent registration, under which a person remains registered "for as long as he continues to reside at the same address."⁶¹ The responsibility for updating the lists according to death records, transfers based on voters' requests, changes in postal or utility services, failure to vote, and, frequently, house-to-house verifications

54. See BENSEL, *supra* note 45, at 139–40. The fraud occurred mostly in tightly-spaced urban precincts, where a voter could go to numerous precincts anonymously. *Id.* Without lists, a voter could even vote multiple times at the same precinct, sometimes with the cooperation of sympathetic officials controlling the precinct. See *id.* at 157.

55. See KEYSSAR, *supra* note 50, at 152. See also JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 18–20 (Inst. for Gov't Research, Studies in Admin. Study No. 27, 1934) (describing trends in voter registration laws after the Civil War and through the early twentieth century) [hereinafter HARRIS, ELECTION ADMINISTRATION]; HARRIS, REGISTRATION OF VOTERS, *supra* note 50, at 72–89 (providing a detailed discussion of the adoption of registration in New York, Pennsylvania, Illinois, and Indiana as typical of the process and politics); BENSEL, *supra* note 45, at xv n.13. (noting that registration could not take hold until the development of "the systematic identification of residence (e.g., numbers on houses) and clearly legible records (e.g., widespread adoption of the typewriter)").

56. See HARRIS, REGISTRATION OF VOTERS, *supra* note 50, at 4, 96–103.

57. See *id.* at 17, 24.

58. *Id.* at 12.

59. See *id.* at 11.

60. See *id.* at 15 (noting that signature verification was highly effective in the states that adopted it).

61. *Id.* at 16–18.

shifted from precinct officials to the city or county central office.⁶² This shift to permanent registration minimized the activities of any precinct-based government entities except on election day.

In sum, the purpose of precincts was to make access to the polls easier for voters. However, with multiple voting sites came the increased risk of fraud, including voting more than once and voting in elections for which the voter was not qualified to vote.

C. Current Precinct Structure

With this history in mind, we now address whether contemporary precincts are reasonably sized. To answer this question, we compiled data on precincts for each of the fifty states plus the District of Columbia. The analysis that follows points out questions about precinct size both in terms of people per precinct and, as importantly, area per precinct. Area per precinct is central to the question of likelihood of voting out-of-precinct: the larger the area, the lower the probability that voters will vote out-of-precinct. Area per precinct also affects shifting precinct lines and the need for provisional balloting.

Table 1 presents statewide data for the 2004 election, showing the population density of the state, the total number of precincts, the population per precinct, and the area per precinct.⁶³ We recognize the inherent imprecision in making comparisons of one state to another; each has its own population distribution within its borders, its own level of concentration in one or more large cities, its own amount of uninhabitable land, and its own unique transportation network either encouraging or discouraging urban concentration.

Nonetheless, one can wonder why two neighboring states—Ohio and Pennsylvania—have approximately the same population, area, and population density, yet have average precinct sizes of 3.9 and 4.9 square miles respectively. Indeed, one would expect Pennsylvania, the state with slightly higher density, to have the smaller precinct size,

62. *See id.* at 17, 52–60, 207–13. For a list of the twenty-nine states that had permanent registration in 1929 and the eighteen states still using periodic registration (including the frequency of required new registration), *see id.* at 97–99. By 1934, five additional states had shifted to permanent registration. *See* HARRIS, ELECTION ADMINISTRATION, *supra* note 55, at 22.

63. *See infra* Table 1. Our survey found that, nationally, there were 184,633 precincts in the 2004 election. Election Data Services (EDS) calculated a similar number (185,994). *See* EAC SURVEY, *supra* note 17, at 13–2. EDS explained that the Election Assistance Commission's 2004 survey, *infra* note 210, had a smaller number (174,252) because of the failure of Connecticut, New Hampshire, and Pennsylvania to respond. *Id.* Some of the differences are likely explained by disparate treatment in the underlying data with regard to precincts used for early voting and for absentee voters.

yet it does not. Similarly, Connecticut is about half the size of neighboring Massachusetts in both area and population, so the two states' population densities are similar (630.3 and 609.8 people per square mile). Yet Connecticut's average precinct size is 7.2 square miles, while Massachusetts's is 4.9 square miles. Even rural states like Arkansas and Iowa, which have similar population densities, have comparable discrepancies regarding precinct size (19.7 and 28.3 square miles).

TABLE 1
STATEWIDE PRECINCT DATA

Statewide Precinct Data		Population (estimated July 1, 2004)*	Area of State (sq. mi.)†	Population Density (per sq. mi.)	Number of Precincts (election districts, wards, 2004)‡	Average Population per Precinct	Average Area per Precinct (sq. mi.)
Alabama		4,517,442	52,419	86.2	2,210	2,044	23.7
Alaska		656,834	663,267	1.0	439	1,496	1,510.9
Arizona		5,745,674	113,998	50.4	2,109	2,724	54.1
Arkansas		2,746,823	53,179	51.7	2,693	1,020	19.7
California		35,841,254	163,696	219.0	24,035	1,491	6.8
Colorado		4,598,507	104,094	44.2	3,370	1,365	30.9
Connecticut		3,493,893	5,543	630.3	769	4,543	7.2
Delaware		828,762	2,489	333.0	437	1,896	5.7
District of Columbia		579,720	68	8,525.3	142	4,083	0.5
Florida		17,366,593	65,755	264.1	6,773	2,564	9.7
Georgia		8,935,151	59,425	150.4	3,022	2,957	19.7
Hawaii		1,259,299	10,931	115.2	353	3,567	31.0
Idaho		1,394,524	83,570	16.7	899	1,551	93.0
Illinois		12,713,548	57,914	219.5	11,738	1,083	4.9
Indiana		6,223,329	36,418	170.9	5,602	1,111	6.5
Iowa		2,953,679	56,272	52.5	1,986	1,487	28.3
Kansas		2,738,356	82,277	33.3	2,600	1,053	31.6
Kentucky		4,140,427	40,409	102.5	3,482	1,189	11.6

Statewide Precinct Data						
State	Population (estimated July 1, 2004)*	Area of State (sq. mi.)†	Population Density (per sq. mi.)	Number of Precincts (election districts, wards, 2004)‡	Average Population per Precinct	Average Area per Precinct (sq. mi.)
Louisiana	4,495,706	51,840	86.7	4,124	1,090	12.6
Maine	1,313,921	35,385	37.1	627	2,096	56.4
Maryland	5,553,249	12,407	447.6	1,787	3,108	6.9
Massachusetts	6,435,995	10,555	609.8	2,156	2,985	4.9
Michigan	10,093,398	96,716	104.4	5,219	1,934	18.5
Minnesota	5,094,304	86,939	58.6	4,108	1,240	21.2
Mississippi	2,892,668	48,430	59.7	1,961	1,475	24.7
Missouri	5,752,861	69,704	82.5	5,462	1,053	12.8
Montana	926,345	147,042	6.3	856	1,082	171.8
Nebraska	1,746,980	77,354	22.6	1,668	1,047	46.4
Nevada	2,332,484	110,561	21.1	1,723	1,354	64.2
New Hampshire	1,297,961	9,350	138.8	309	4,201	30.3
New Jersey	8,675,879	8,721	994.8	6,287	1,380	1.4
New Mexico	1,900,620	121,589	15.6	1,510	1,259	80.5
New York	19,291,526	54,556	353.6	15,819	1,220	3.4
North Carolina	8,531,040	53,819	158.5	2,745	3,108	19.6
North Dakota	635,848	70,700	9.0	607	1,048	116.5
Ohio	11,461,347	44,825	255.7	11,366	1,008	3.9
Oklahoma	3,522,827	69,898	50.4	2,152	1,637	32.5
Oregon ♦	3,589,168			Not applicable --vote by mail		

Statewide Precinct Data						
State	Population (estimated July 1, 2004)*	Area of State (sq. mi.)†	Population Density (per sq. mi.)	Number of Precincts (election districts, wards, 2004)‡	Average Population per Precinct	Average Area per Precinct (sq. mi.)
Pennsylvania	12,377,381	46,055	268.8	9,400	1,317	4.9
Rhode Island	1,078,930	1,545	698.3	577	1,870	2.7
South Carolina	4,194,694	32,020	131.0	2,168	1,935	14.8
South Dakota	770,188	77,116	10.0	827	931	93.2
Tennessee	5,885,597	42,143	139.7	2,285	2,576	18.4
Texas	22,517,901	268,581	83.8	8,593	2,620	31.3
Utah	2,421,500	84,899	28.5	1,880	1,288	45.2
Vermont	620,795			Not applicable -no precinct structure		
Virginia	7,472,448	42,774	174.7	2,562	2,917	16.7
Washington	6,205,535	71,300	87.0	6,686	928	10.7
West Virginia	1,810,906	24,230	74.7	1,960	924	12.4
Wisconsin	5,498,807	65,498	84.0	7,067	778	9.3
Wyoming	505,534	97,814	5.2	483	1,047	202.5
			Precinct total	187,633		
* Data taken from Michael Barone & Richard E. Cohen, <i>Almanac of American Politics</i> 2006 (2005)						
† <i>Id.</i>						
‡ Data compiled by authors based on websites and personal interviews. Data is on file with the New York University Journal of Legislation and Public Policy. In cases where website data and interview data conflicted, the authors have used interview data to maintain consistent methodology. The authors believe that the discrepancies are due to the fact that many states have "precincts" that are created simply for absentee voter data and for early voting. It is likely that interview data for some states does include these kinds of precincts in the precinct number data however, such precincts are not germane to the election day out-of-precinct voting problem.						
♦ Oregon is complete vote by mail but maintains a precinct structure just in case.						

A review of the table also reveals the distinct range of state-to-state differences in total population per precinct. The rates, which do not consider non-voting age population, inactive voters, or recent voter turnout, range from a high of 4,543 people per precinct in Connecticut to a low of 778 people per precinct in Wisconsin. The per precinct numbers would be significantly smaller if measured in terms of voting age population, active voters, or recent voter turnout, and many factors can help to create the differences across states. The most important factor in creating differences among states may be data deviations created by the various states' differing statutory definitions for what constitutes a precinct. For instance, Kansas has many precincts in which no people live but are nonetheless required because of the way that Kansas geographically defines a precinct.⁶⁴ Despite these inconsistencies, we can make the very basic conclusion that the wide range in number of people assigned to a precinct seems to have little to do with the most administratively efficient number of people to assign to a precinct.

To adjust for problems in using statewide data, we also examined data for the most populous counties, or "urbanized areas," in each state.⁶⁵ In Table 2, looking at comparable urbanized counties, there appears to be some congruity, but wide disparities still exist. Denver County, Colorado and Bergen County, New Jersey have relatively similar population densities and precinct sizes, with 1,318 and 1,318 people per precinct. But Milwaukee County, Wisconsin, which has a similar population density as Bergen County and Denver County, has a precinct area and precinct population twice the size of theirs. New York City (treating all five of its counties as one unit) is by far the most densely populated "county" in the country, with a population density of 26,227 people per square mile. Philadelphia County—the next most densely populated—has only forty percent the density of New York City, with 10,890 people per square mile. Yet both have an assigned 0.1 square mile per precinct. New York City has a population per precinct of 1,338, while Philadelphia's is only 875. The Dis-

64. See KAN. STAT. ANN. § 25-26a02(a) (2000) ("Each election precinct shall be composed of contiguous and compact areas having clearly observable boundaries using visible ground features.") This definition mandates the creation of precincts based on geography, not population. The data shown in the table for Kansas ignore those precincts, reporting instead on actual polling places. Other states may have similar requirements that are not compensated for in the data reported by the states to us.

65. See *infra* Table 2. The Census Bureau defines an urbanized area as "a central place(s) and adjacent territory with a general population density of at least 1,000 people per square mile of land area that together have a minimum residential population of at least 50,000 people." U.S. Census Bureau, U.S. Census 2000 Glossary, http://factfinder.census.gov/home/en/epss/glossary_u.html (last visited Jan. 22, 2007).

trict of Columbia has a population density comparable to Philadelphia's, yet uses precincts of 0.5 square miles and 4,083 people per precinct. Illinois's Cook County (Chicago) has a population density of 5,631.3 people per square mile yet has precincts of 1,041 people and 0.2 square miles per precinct. Cook County's precincts seem too small when compared to New York City, let alone the District of Columbia.

TABLE 2
MOST POPULOUS COUNTY PRECINCT DATA

Most Populous County Precinct Data									
State	Largest County (based on est. 2004 pop.)*	Population (estimated July 1, 2004)†	Area of County (sq.mi.)‡	Population Density (per sq. mi.)	Number of Precincts (2004)§	Average Population per Precinct	Average Area per Precinct (per sq. mi.)	Principal City in County**	
Alabama	Jefferson	658,468	1,113	591.6	188	3,502	5.9	Birmingham	
Alaska	Anchorage	274,067	1,698	161.4	119	2,303	14.3	Anchorage	
Arizona	Maricopa	3,498,587	9,204	380.1	1,058	3,307	8.7	Phoenix	
Arkansas	Pulaski	365,228	771	473.7	134	2,726	5.8	Little Rock	
California	Los Angeles	9,917,331	4,060	2,442.7	4,602	2,155	0.9	Includes Los Angeles	
Colorado	Denver	555,991	153	3,633.9	422	1,318	0.4	Denver	
Connecticut	Fairfield	901,819	626	1,440.6	Not available	Not available	Not available	Bridgeport	
Delaware	New Castle	518,728	426	1,217.7	304	1,706	1.4	Wilmington	
District of Columbia	Same	579,720	61	9,503.6	142	4,083	0.4	Washington, D.C.	
Florida	Miami-Dade	2,358,714	1,945	1,212.7	749	3,149	2.6	Miami	
Georgia	Fulton	905,802	529	1,712.3	338	2,680	1.6	Atlanta	
Hawaii	Honolulu	899,562	600	1,499.3	217	4,145	2.8	Honolulu	
Idaho	Ada	332,545	1,055	315.2	125	2,660	8.4	Boise	
Illinois	Cook	5,327,165	946	5,631.3	5,115	1,041	0.2	Includes Chicago	
Indiana	Marion	861,847	396	2,176.4	914	943	0.4	Indianapolis	
Iowa	Polk	394,031	570	691.3	183	2,153	3.1	Des Moines	
Kansas	Johnson	496,892	477	1,041.7	415	1,197	1.1	Overland Park	
Kentucky	Jefferson	698,903	385	1,815.3	506	1,381	0.8	Louisville	
Louisiana	Orleans	461,115	181	2,547.6	442	1,043	0.4	New Orleans	
Maine	Cumberland	273,622	836	327.3	63	4,343	13.3	Portland	
Maryland	Montgomery	921,631	495	1,861.9	235	3,922	2.1	Not available	
Massachusetts	Middlesex	1,462,822	824	1,775.3	474	3,086	1.7	Cambridge	

Most Populous County Precinct Data									
State	Largest County (based on est. 2004 pop.)*	Population (estimated July 1, 2004)†	Area of County (sq.mi.)‡	Population Density (per sq. mi.)	Number of Precincts (2004)§	Average Population per Precinct	Average Area per Precinct (per sq. mi.)	Principal City in County**	
Michigan	Wayne	2,013,771	614	3,279.8	1,198	1,681	0.5	Detroit	
Minnesota	Hennepin	1,119,866	557	2,010.5	430	2,604	1.3	Minneapolis	
Mississippi	Hinds	249,828	869	287.5	104	2,402	8.4	Jackson	
Missouri	St. Louis County	1,007,723	508	1,983.7	480	2,099	1.1	Excludes St. Louis City	
Montana	Yellowstone	134,806	2,635	51.2	69	1,954	38.2	Billings	
Nebraska	Douglas	481,203	331	1,453.8	341	1,411	1.0	Omaha	
Nevada	Clark	1,648,524	7,911	208.4	1,042	1,582	7.6	Las Vegas	
New Hampshire	Hillsborough	398,355	876	454.7	52	7,661	16.8	Nashua	
New Jersey	Bergen	901,745	234	3,853.6	557	1,619	0.4	No dominant city	
New Mexico	Bernalillo	592,538	1,166	508.2	496	1,195	2.4	Albuquerque	
New York	New York City (5 counties)	8,164,706	309	26,423.0	6,101	1,338	0.1	New York City	
North Carolina	Mecklenburg	771,573	527	1,464.1	189	4,082	2.8	Charlotte	
North Dakota	Cass	129,583	1,766	73.4	59	2,196	29.9	Fargo	
Ohio	Cuyahoga	1,349,047	458	2,945.5	1,436	939	0.3	Cleveland	
Oklahoma	Oklahoma	679,498	709	958.4	295	2,303	2.4	Oklahoma City	
Oregon ††	Not applicable - vote by mail								
Pennsylvania	Philadelphia	1,471,255	135	10,898.2	1,682	875	0.1	Philadelphia	
Rhode Island	Providence	641,874	413	1,554.2	340	1,888	1.2	Providence	
South Carolina	Greenville	401,019	792	506.3	136	2,949	5.8	Greenville	
South Dakota	Minnehaha	157,158	809	194.3	69	2,278	11.7	Sioux Falls	
Tennessee	Shelby	906,287	755	1,200.4	283	3,202	2.7	Memphis	

Most Populous County Precinct Data								
State	Largest County (based on est. 2004 pop.)*	Population (estimated July 1, 2004)†	Area of County (sq.mi.)‡	Population Density (per sq. mi.)	Number of Precincts (2004)§	Average Population per Precinct	Average Area per Precinct (per sq. mi.)	Principal City in County,**
Texas	Harris	3,641,114	1,729	2,105.9	913	3,988	1.9	Houston
Utah	Salt Lake	934,838	737	1,268.4	708	1,320	1.0	Salt Lake City
Vermont	Not applicable - no precinct structure							
Virginia	Fairfax	1,002,488	396	2,531.5	231	4,340	1.7	No dominant city
Washington	King	1,777,746	2,126	836.2	2,616	680	0.8	Seattle
West Virginia	Kanawha	194,941	903	215.9	183	1,065	4.9	Charleston
Wisconsin	Milwaukee	926,764	242	3,829.6	314	2,951	0.8	Milwaukee
Wyoming	Laramie	85,033	2,686	31.7	58	1,466	46.3	Cheyenne
* Data taken from U.S. Census Bureau, available at http://www.census.gov/popest/counties/CO-EST2005-01.html .								
† <i>Id.</i>								
‡ Data taken from National Association of Counties, available at http://www.naco.org/Template.cfm?Section=Find_a_County&Template=/cfiles/counties/usamap.cfm .								
§ Data compiled by authors based on websites and personal interviews, on file with the New York University Journal of Legislation and Public Policy.								
** Data taken from NACO website, available at http://www.naco.org/Template.cfm?Section=Find_a_County&Template=/cfiles/counties/usamap.cfm . County seat was used as the principal city.								
†† Oregon is complete vote by mail but maintains precinct structure just in case.								

Looking at populous counties with slightly lower densities, Fulton County, Georgia (Atlanta), Honolulu County (Hawaii), Mecklenburg County, North Carolina (Charlotte), and Providence County, Rhode Island are all close in terms of density. Yet Fulton County's precincts average 2,680 people and 1.6 miles, Providence County's average 1,888 people and 1.2 square miles, and Honolulu County's and Mecklenburg County's average about 4,100 people and 2.8 miles. There are even discrepancies in rural counties. Jefferson County, Alabama and Bernalillo County, New Mexico are comparable, with densities of 591.6 people and 508.2 respectively. Yet the Alabama county's precincts have 3,502 people and 5.9 square miles, while the New Mexico county has 1,195 people and 2.4 square miles per precinct. Clearly the mileage footprints should be reversed, and the precinct population for the New Mexico county seems small.

We ran one more test to learn if there was any consistency within individual states. Table 3 shows those results. Because many states have only one or two major metropolitan areas, it is difficult to pick two counties within a state that have comparable populations, areas, and population densities. The pairings generally show those with the closest fits. Of the seventeen pairs shown, eleven are relatively close in average precinct area, while six—those in Mississippi, Missouri, Nebraska, South Carolina, Tennessee, and Virginia—are noticeably out of alignment. These six pairings suggest conflicting views between the counties paired as to the correct number of people to assign to a precinct. Such intrastate comparisons raise questions of uniform treatment by a state of its voters and of possible equal protection issues. It seems that leaving precinct determination decisions to individual counties opens the door to legally significant disparities.⁶⁶

66. See *Stewart v. Blackwell*, 444 F.3d 843, 869–70 (6th Cir. 2006), *vacated as moot* by *Stewart v. Blackwell*, No. 05-3044, 2007 WL 77853 (6th Cir. Jan. 12, 2007). (finding equal protection violations where Ohio counties used different types of voting machines).

TABLE 3 ILLUSTRATIVE COUNTY PAIRS' PRECINCT DATA *

Illustrative County Pairs' Precinct Data *							
State	County Pairs	Population (est. July 1, 2004)	Area	Population Density (per sq. mi.)	Number of Precincts	Population per Precinct	Area per Precinct (per sq. mi.)
Arkansas	Faulkner	95,074	647	146.9	47	2,023	13.8
	Garland	92,222	678	136.0	41	2,249	16.5
	Arapahoe	522,346	803	650.5	386	1,353	2.1
Colorado	Jefferson	526,648	772	682.2	330	1,596	2.3
	Hillsborough	1,100,333	1,051	1,046.9	359	3,065	2.9
	Orange	989,873	908	1,090.2	263	3,764	3.5
Georgia	Cherokee	174,851	424	412.4	46	3,801	9.2
	Hall	160,788	394	408.1	41	3,922	9.6
	Montgomery	921,631	495	1,861.9	235	3,922	2.1
Maryland	Prince George's	841,642	486	1,731.8	204	4,126	2.4
	Kalamazoo	239,748	562	426.6	112	2,141	5.0
	Ottawa	252,945	566	446.9	100	2,529	5.7
Mississippi	Lauderdale	77,496	704	110.1	53	1,462	13.3
	Madison	81,935	719	114.0	40	2,048	18.0
	Greene	247,992	675	367.4	140	1,771	4.8
Missouri	Jefferson	210,466	657	320.3	84	2,506	7.8

Illustrative County Pairs' Precinct Data *								
State	County Pairs	Population (est. July 1, 2004)	Area	Population Density (per sq. mi.)	Number of Precincts	Population per Precinct	Area per Precinct (per sq. mi.)	
Nebraska	Dodge	36,000	534	67.4	32	1,125	16.7	
	Madison	35,667	573	62.2	26	1,372	22.0	
New Jersey	Camden	515,620	222	2,322.6	331	1,558	0.7	
	Passaic	498,939	185	2,697.0	288	1,732	0.6	
Ohio	Montgomery	549,553	462	1,189.5	588	935	0.8	
	Summit	546,608	413	1,323.5	475	1,151	0.9	
Oklahoma	Creek	68,647	956	71.8	42	1,634	22.8	
	Muskogee	70,478	814	86.6	33	2,136	24.7	
South Carolina	Charleston	327,403	917	357.0	177	1,850	5.2	
	Spartanburg	264,106	811	325.7	97	2,723	8.4	
Tennessee	Montgomery	141,806	539	263.1	24	5,909	22.5	
	Sumner	141,732	529	267.9	33	4,295	16.0	
Virginia	Augusta	68,713	972	70.7	27	2,545	36.0	
	Pittsylvania	61,790	971	63.6	33	1,872	29.4	
West Virginia	Monongalia	84,061	361	232.9	92	914	3.9	
	Wood	87,014	367	237.1	85	1,024	4.3	
* Data sources are the same as for Table 2, Most Populous County Data.								

The inconsistent treatment of precincts also shows states' statutory limitations on the number of persons per precinct. Of the fifty states and the District of Columbia, most have a maximum number of individuals that can be assigned to an individual precinct, and some have minimum number as well. But a substantial minority—twenty-three—have no maximum figure. Of those that do have a maximum, the terms of reference vary. Some are set in terms of total population, some in terms of registered voters, some in terms of active voters, and some in terms of votes cast in the last general election.⁶⁷ Some states have maxima differentiating between urban and rural counties.⁶⁸ Cognizant of those comparative issues, the range is from Illinois's maximum (in highly urban areas) of 800 voters to Tennessee's and Virginia's uniform statewide maxima of 5,000 registered voters.

While each state presumably established its figure with some notion of administrative efficiency and voter travel time, there is no clear reason why the states have come to such widely disparate conclusions. We make no definitive conclusions from these data, and we leave to the demographers more rigorous study. But the hodgepodge of data presented in these tables establishes the absence of rational state or county principles for creating precincts.

The origin of many state precinct limits may, in fact, be historical artifacts tied to the earlier era when most of the country used lever machines, and there were estimates of how many voters could be processed on each lever machine on election day.⁶⁹ We need not re-

67. See *infra* Appendix (table listing state statutory precinct requirements). Currently, twenty-seven states have a maximum population for precincts mandated by statute. *Id.* Twenty-three states have no maximum and Wyoming can be read as having no maximum since population growth does not result in creation of new precincts. *Id.*

68. See *id.*

69. Some indication of the weak analytical basis for at least old maxima can be found in a 1968 study by E.S. Savas. Savas, working with colleagues from the Riverside Research Institute, developed a computer model for drawing New York City election districts efficiently, given the state law constraints on the maximum number of voters per election district and the maximum number of voters per lever voting machine. See E.S. Savas, *A Computer-Based System for Forming Efficient Election Districts*, 19 OPERATIONS RES. 135 (1971). Prior to the 1957 advent of permanent registration in New York, the City Board of Elections would redraw the election district lines every year. *Id.* at 136. With permanent registration and the apparent lack of time to redistrict, the Board of Elections often added a second voting machine rather than changing the district lines. *Id.* As for the state maxima, at that time the law had an upper limit of voters per election district of 750 for one-machine districts and 1,050 for two-machine districts. *Id.* at 149. Savas noted that "[t]aken together, this is a strange pair of limits. It is much more logical that the latter be twice the former, which would tend to equalize the delays for all voters, regardless of whether they are assigned to one-machine or two-machine districts." *Id.* at 149–50. He

view in detail this theory; tracing this history is beyond the scope of this paper. It is enough that we point out the lack of obvious analytical support.

D. Criticisms of the Precinct Structure

In 1934, Joseph Harris offered a number of criticisms of the states' precinct structures, many of which are still valid today.⁷⁰ One was that precinct size varied widely from state to state not because of differences among jurisdictions, but simply "due to custom and to state law."⁷¹ Harris also concluded that some states capped the number of voters per precinct at unreasonably low levels. He argued that:

The great variation in the number of voters to the precinct authorized by the state laws indicates in itself that such provisions are unwise. If the precinct officers of Massachusetts are able to take care of two thousand voters, there can be no justification for state laws restricting the number of voters to the precinct to two hundred in California, two hundred and fifty in Indiana, three hundred in Washington, Oregon, Nebraska, and Colorado, and so on.⁷²

Harris pointed out that small precincts probably made sense in the early nineteenth century, when there were few large cities and primitive transportation.⁷³ However, when Harris published his study in 1934, he noted that many Canadian cities had created election districts with as many as five thousand registered voters.⁷⁴ Harris argued that election districts in the United States should similarly be increased in size.⁷⁵ The low limits on voters-per-precinct made little sense given data showing that only about half of a precinct's voters would show up to vote.⁷⁶

Harris was not suggesting that the maximum voter caps be raised. Rather, he believed that there should be no maximum caps, just a minimum floor of four hundred voters for precincts in cities.⁷⁷ Removing the maximum caps would give local officials more discretion in de-

thought the standards should be changed to 600 and 1,200, noting that queuing theory suggested that a two-machine district could accommodate even more than twice as many voters, with equal waiting times. *Id.* at 150.

70. See HARRIS, ELECTION ADMINISTRATION, *supra* note 55.

71. *Id.* at 207.

72. *Id.* at 208.

73. *Id.* at 9–10.

74. *Id.* at 211.

75. *Id.*

76. *Id.* at 208–09.

77. *Id.* at 41.

signing precincts.⁷⁸ Additionally, Harris argued that larger precincts would result in cost savings through efficiencies, including more productive poll workers and fewer rented polling places, as he found precinct size to be “unquestionably the most important factor determining the cost of elections.”⁷⁹ Larger precincts also would be less susceptible to alterations that would require moving the polling place from one year to the next, thereby reducing voter uncertainty as to where to go to vote each year.⁸⁰ Harris further believed that larger polling places would have greater quality control, because they could be staffed with a responsible person from the central elections office and thus run under more strict supervision.⁸¹

Finally, Harris did not believe that increasing the size of precincts would greatly inconvenience voters, because “[p]aved streets, improved transportation, and the universal use of the automobile have relieved the necessity for small precincts.”⁸² Indeed, he noted that in many cities multiple precincts already were located in the same polling place.⁸³

III.

PROVISIONAL VOTING: THE IDEA AND ITS IMPLEMENTATION

The right to a provisional voting ballot and the requirement for computerized statewide voter registration lists are centerpiece reforms of HAVA.⁸⁴ Because Congress sought to eliminate the chaos and strife regarding disputed registrations at the polling place, HAVA guarantees that every voter encountering eligibility questions has the

78. *Id.* The recommendation that precincts be limited by minimum figures and not maxima had previously been published by the Committee on Election Administration of the National Municipal League, of which Harris was a member. *Id.* at 24. Alexander Keyssar went even further in his critique of small precincts, finding nefarious intent in some historical instances: “[A]lthough justified as a means of insuring that election judges would be familiar with their constituents, the creation of tiny precincts meant that anyone who moved even a few blocks was likely to have to register again and meet a new thirty-day residency requirement.” KEYSSAR, *supra* note 50, at 154. For a listing of the precinct residency time requirements from 1870–1923, see *id.* at 380–88 tbl.A.14.

79. See HARRIS, ELECTION ADMINISTRATION, *supra* note 55, at 209–10.

80. *Id.* at 213.

81. *Id.* at 42.

82. *Id.* See also *id.* at 212–13. Harris officially used “size” of precincts to refer to population size, but he also discussed “size” in terms of voters having further to travel. “Increasing the size of precincts” thus implicates an increase in both the population per precinct and its area. See *id.* at 42.

83. *Id.* at 42–43. See also *infra* notes 239–42 and accompanying text.

84. See *supra* notes 7–10 and accompanying text.

right to cast a provisional ballot.⁸⁵ Election officials are to review each provisional ballot after election day, research whether the person was in fact an eligible voter, and, if so, count the ballot as valid.⁸⁶ HAVA's legislative history, while limited, reinforces the importance of provisional voting, finding that it "represents the ultimate safeguard to ensuring a person's right to vote."⁸⁷

The 2004 election was the first in which the HAVA provisional ballot requirement was implemented, and the implementation was not without difficulties. Questions and legal challenges arose as to whether provisional ballots cast in a precinct other than the voter's assigned precinct should be counted. There were conflicting interpretations of the Act regarding whether state law or federal law controlled the counting of provisional ballots. We discuss below the thin provisional ballot legislative history of HAVA and the litigation about provisional ballots that arose in 2004.

A. *Pre-HAVA Studies*

The bipartisan National Commission on Federal Election Reform—chaired by former Presidents Gerald Ford and Jimmy Carter (Ford-Carter Commission)—recommended in 2001 that voter registration move away from local control and be organized and administered on a statewide basis.⁸⁸ Centralization was needed in order to ensure that voters' registration information is updated as voters move.⁸⁹ Conceding that no registration system, no matter how sophisticated, will be error-free, the Commission also recommended that provisional balloting be available to all voters within the state on election day, regardless of the location of their precinct or polling place.⁹⁰ Both recommendations were motivated by the same objective: that "[n]o American qualified to vote anywhere in his or her state should be turned away from a polling place in that state."⁹¹

The Ford-Carter Commission then proposed a method for counting provisional ballots. If, after the election, authorities concluded that the provisional voter was eligible to vote, but voted in the wrong jurisdiction, the ballot should not be forwarded to the correct district, as was the practice in some states. Instead, the ballot should be ac-

85. *Id.*; HAVA § 302(a), 42 U.S.C. § 15482(a)(3)–(4) (Supp. III 2005).

86. § 302(a)(3)–(4).

87. H.R. REP. NO. 107-329, pt. 1, at 37 (2001). *See infra* Part IV.B.3.

88. *See* NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE & CONFIDENCE IN THE ELECTORAL PROCESS 28 (2002) [hereinafter FORD-CARTER COMM'N].

89. *Id.* at 29.

90. *Id.* at 35–36.

91. *Id.* at 34.

cepted as a limited ballot—valid only for the races the voter was eligible for at the place where the ballot was cast, such as statewide races or the congressional district race if within the same district.⁹² The Ford-Carter Commission recognized that the post-election administrative effort necessary to process provisional ballots was significant (from five or ten minutes to one hour per ballot) and would slow completion of the official election results.⁹³ Nevertheless, the Commission believed that this cost was outweighed by the benefits to the system, primarily allowing all eligible voters to vote.⁹⁴ Other task forces, made up primarily of state and local election administrators, also recommended that all states establish provisional balloting.⁹⁵

B. HAVA

Section 302(a) of HAVA establishes that if a voter's name "does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote," the individual shall be permitted to cast a provisional ballot.⁹⁶ Section 302(a)(2) contains the only HAVA requirements on the voter for casting the provisional ballot: the individual must affirm in writing that he or she is both a "registered voter in the jurisdiction" and "eligible to vote in that election."⁹⁷ However, section 302(a)(4) complicates matters by stating, "[i]f the appropriate State or local election official to whom the ballot or voter information is transmitted . . . determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accor-

92. *Id.* at 36.

93. *See id.*

94. *See id.* at 36–37.

95. *See, e.g.*, NAT'L TASK FORCE ON ELECTION REFORM 2000, *supra* note 10 (recommending that all jurisdictions adopt provisional ballots in the absence of "election day registration or other solutions to address registration questions"), *available at* <http://www.electioncenter.org/publications/electionrefortreport2001.pdf>; NAT'L COMM'N ON ELECTION STANDARDS & REFORM, REPORT & RECOMMENDATIONS TO IMPROVE AMERICA'S ELECTION SYSTEM 4, 8 (2001), *available at* http://www.naco.org/Content/ContentGroups/Programs_and_Projects/Information_Technology1/Elections1/election.pdf (recommending that states have provisional ballots that are counted after confirmation of voter eligibility); THE CONSTITUTION PROJECT, BUILDING CONSENSUS ON ELECTION REFORM, 8–9 (2001), *available at* <http://www.secstate.wa.gov/documentvault/TheConstitutionProjectBuildingConsensusonElectionReformAugust2001-1023.pdf> (recommending that "voters, at a minimum, should have an opportunity to submit provisional ballots").

96. HAVA § 302(a), 42 U.S.C. § 15482(a) (Supp. III 2005).

97. § 302(a)(2).

dance with State law.”⁹⁸ This sentence is the source of the confusion and discord over the effectiveness of the HAVA requirement.⁹⁹

There is little in the legislative history to explain why the final provision is so written. The reporting House Committee issued an extensive report¹⁰⁰ to accompany the bill that it sent to the floor (H.R. 3295) on December 10, 2001.¹⁰¹ But the reporting Senate Committee did not issue a report to accompany the bill it sent to the floor (S. 565) earlier that year.¹⁰² On December 19, 2001, shortly after H.R. 3295 passed the House, Senators Dodd, McConnell, and Bond introduced a replacement to S. 565, in the form of an amendment (SA 2688), that Senators Dodd and McConnell, as the floor managers of the debate on the Senate floor, would offer at the outset of the debate (Managers’ Amendment).¹⁰³ The sponsors of the amendment mentioned but did not discuss the counting portion of the provisional ballot provision at the time of introduction.

The Managers’ Amendment, as a complete substitute for the bill reported out of the Senate Committee on Rules and Administration, became the basis of the bill that passed the Senate on April 11, 2002.¹⁰⁴ The House-Senate Conference Report for the final version of HAVA was intentionally written not to elaborate on any of the bill’s language.¹⁰⁵ Although individual senators made statements on the floor at the time of consideration of the Conference Report, the House Report is the only document representing the views of more than one member that contains any significant explanatory substance.

98. § 302(a)(4).

99. See *infra* Part III.C (discussing the use of provisional ballots in the 2004 election and courts’ analysis of section 302(a)(4) prior to the election).

100. See H.R. REP. NO. 107-329, pt. 1 (2001).

101. H.R. 3295, 107th Cong. (2001).

102. S. 565, 107th Cong. (2001). The reporting of S. 565 exemplifies the difficulties of enacting HAVA. The committee reported the bill, supported by the ten Democratic committee members, after the nine Republican committee members boycotted the markup session. The boycott was triggered by committee chairman Senator Dodd’s refusal to consider S. 953, a competing measure from the committee’s ranking Republican, Senator McConnell. See Bill Swindell, *Democrats Spurn GOP & Approve Voting Mandates Bill*, CQ MONITOR NEWS, Aug. 2, 2001. See also 147 CONG. REC. S8876 (daily ed. Aug. 3, 2001) (statement of Sen. Dodd).

103. See 147 CONG. REC. S13764–71 (daily ed. Dec. 19, 2001). See also 147 CONG. REC. S13682 (daily ed. Dec. 19, 2001) (statement of Sen. Dodd).

104. See 148 CONG. REC. S713 (daily ed. Feb. 13, 2002) (statement of Sen. McCain) (“I urge my colleagues to support the compromise amendment in the nature of a substitute to S. 565.”); *id.* at S2544 (daily ed. Apr. 11, 2002).

105. See *infra* Part III.B.3.

1. *The House Version*

H.R. 3295, as introduced and reported to the House, contained in section 502(3) a requirement that the states enact legislation permitting “in-precinct provisional voting by every voter who claims to be qualified to vote in the State.”¹⁰⁶ The bill did not address whether to count a provisional ballot. The House Report that accompanied H.R. 3295, in describing section 502(3) of the bill, also delineates the requirements for casting a provisional ballot as eligibility in the precinct.¹⁰⁷

Although the term “in-precinct” is used in both the bill and the report, because of its generality, the reference should be read to focus on polling place voting, rather than literally on the question of voting only in the correct precinct. Supporting that interpretation is the detailed discussion in the report of when a provisional ballot might be needed. The report found that there were at least eight reasons why a person’s name might not appear on the list of qualified voters for a precinct, almost all of which reference problems at the polling place itself: (1) administrative errors such as oversight or misspelled names; (2) poll workers “may not be aware that the voter is listed on a supplemental roster containing the names of voters who registered shortly before the election”; (3) voters may have been “improperly removed from the voting rolls”; (4) voters may have not received, or received “but did not heed, a notice that their polling place had moved”; (5) administrative agencies “that are supposed to make registration applications available to clients may improperly handle the applications or fail to forward them to proper election officials in a timely manner”; (6) “voters may fail to notify their registrar, or fail to re-register, after a change of address”; (7) “well-intentioned nongovernmental organizations may mishandle registration materials”; or (8) the voter may simply have “fail[ed] to register.”¹⁰⁸

A number of these circumstances, most notably (4)—the implied appearance at the wrong polling place—could not be alleviated if “precinct” were read narrowly to exclude the “polling place” meaning. The bill as reported was passed by the full House on December 12, 2001, with no changes to the provision.¹⁰⁹

106. H.R. 3295, 107th Cong. § 502(3) (2001).

107. H.R. REP. NO. 107-329, pt. 1, at 37 (2001) (“In-precinct provisional voting enables people whose eligibility is in doubt to vote in their precinct, without having to travel somewhere else to swear they are eligible to vote, and have their registration verified in the days following an election.”).

108. *Id.* at 38.

109. 147 CONG. REC. H9308 (daily ed. Dec. 12, 2001).

2. *The Senate Bill*

As initially introduced by Senator Dodd on March 19, 2001,¹¹⁰ S. 565 provided that any voter who declared himself or herself “to be eligible to vote at a particular polling place” and whose name did not appear on the official roll or it was otherwise asserted that the voter was ineligible to vote at the polling place, would be able to cast a provisional ballot after making a written affirmation of eligibility.¹¹¹ The provisional ballot was to be “tabulated” after an appropriate official verified the affirmation.¹¹² The provision did not contain any reference as to if state law would control whether or not to count the ballot.

The Managers’ Amendment contained the same requirements for a voter to receive and cast a provisional ballot as the enacted HAVA provision. The voter must affirm to be registered in the jurisdiction and eligible to vote in that election.¹¹³ However, the Managers’ Amendment had a different rule for when to count a cast provisional ballot. Unlike both the original Senate bill and the HAVA section enacted after the House-Senate Conference, the Managers’ Amendment stated that: “(4) If the appropriate State or local election official to whom the ballot is transmitted . . . determines that the individual is eligible under State law to vote in the jurisdiction, the individual’s provisional ballot shall be counted as a vote in that election.”¹¹⁴ The standard for counting a provisional ballot was thus eligibility in the *jurisdiction*, not necessarily in the precinct or polling place.

In his final summary of the bill before passage, Senator Dodd described the counting standard in the following way: “The election official then makes a determination, under state law, as to whether the voter is eligible to vote *in the jurisdiction*, or not, and shall count the ballot accordingly.”¹¹⁵ He then clarified the meaning of “jurisdiction”: “It is our intent that the word ‘jurisdiction,’ for the purpose of determining whether the provisional ballot is to be counted, has the same meaning as the term ‘registrar’s jurisdiction’ in section 8(j) of

110. See 147 CONG. REC. S2475 (daily ed. Mar. 19, 2001) (statement of Sen. Dodd).

111. *Id.* Curiously, the GPO website PDF versions of the bill as introduced and as reported on November 28, 2001 differ from the bill as set out in the Congressional Record for March 19, 2001. The Record version does not contain the references to the polling place. See 147 CONG. REC. S2477 (daily ed. Mar. 19, 2001).

112. S. 565, 107th Cong. § 301(b)(4) (2001).

113. See 147 CONG. REC. S13765 (daily ed. Dec. 19, 2001).

114. *Id.*

115. 148 CONG. REC. S2534 (daily ed. Apr. 11, 2002) (statement of Sen. Dodd) (emphasis added).

the National Voter Registration Act.”¹¹⁶ After Dodd spoke, no one—in particular, neither the minority floor manager (Senator McConnell) nor the other leading Republican spokesman (Senator Bond)—contradicted Dodd’s remarks. Thus, the Senate passed the Managers’ Amendment on April 11, 2002 with the counting standard relatively unchanged.¹¹⁷

3. *The Conference Bill*

The House-Senate Conference reported the final bill on October 8, 2002.¹¹⁸ In the bill, the Conference Committee adopted the Senate’s version of the counting provision with two changes. It dropped the phrase “in the jurisdiction” and added “in accordance with State law” at the end. The corresponding conference report did not elaborate on this shift in language, or indeed on any other HAVA provision.¹¹⁹ The conference bill passed the House two days after the filing of the report, without any discussion of the counting provision.¹²⁰

Six days after that, the Senate took up consideration of the conference bill, and there was commentary on the provisional ballot provision.¹²¹ Senator Bond, one of the managers of the bill for the Republican minority, was the first to speak about the provision. He said that if a vote was cast outside the jurisdiction in which the voter was registered, it was not to be counted if state law required voting in the jurisdiction of registration.¹²² Bond next discussed registered voters showing up at the wrong polling place and the continuation of state law provisions authorizing the poll workers to direct the voter to the correct polling place.¹²³ He did not tie such redirection to the question

116. *Id.* at S2535. The relevant NVRA provision can be found at 42 U.S.C. § 1973gg-6(j) (2000). This statement was also noted by the Sixth Circuit in *Sandusky County Democratic Party v. Blackwell* (*Blackwell I*), 339 F. Supp. 2d 975, 990 n.5 (N.D. Ohio 2004). See also *infra* notes 146, 193–98 and accompanying text; *supra* notes 31–38 and accompanying text.

117. 148 CONG. REC. S2544 (daily ed. Apr. 11, 2002). One difference was the inclusion of the voter information language, which was designed to meet the particular needs of provisional balloting in Michigan. See *id.* at S2471 (daily ed. Apr. 10, 2002).

118. H.R. REP. NO. 107-730 (2002).

119. See *id.* at 74–75.

120. 148 CONG. REC. H7853–54 (daily ed. Oct. 10, 2002).

121. See generally 148 CONG. REC. S10488–10516 (daily ed. Oct. 16, 2002).

122. *Id.* at S10491. Senator Bond also noted that “[i]t is not the intent of the authors to overturn State laws regarding registration or state laws regarding the jurisdiction in which a ballot must be cast to be counted.” *Id.*

123. *Id.* Senator Bond stated:

Additionally, it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll workers that the voter

of provisional ballot counting. Bond thus conceived of counting votes cast in the correct jurisdiction, as determined by state law, but not necessarily in the correct precinct.

Bond later continued in a dialogue with Senator McConnell, the ranking Republican minority member of the Senate Rules Committee, which issued the first Senate version, and also a manager of the bill. In this dialogue, Senator Bond concurred with Senator McConnell's description of the counting rule:

I agree completely with the Senator's description of this provision. Congress has said only that voters in Federal elections should be given a provisional ballot if they claim to be registered in a particular jurisdiction and that jurisdiction does not have the voter's name on the list of registered voters. The voter's ballot will be counted only if it is subsequently determined that the voter was in fact properly registered and eligible to vote *in that jurisdiction*. . . . but the voter's name was erroneously absent from the list of registered voters. This provision is in no way intended to require any State or locality to allow voters to vote from any place other than *the polling site* where the voter is registered.¹²⁴

Most of Bond's explanation implies that the relevant requirement is jurisdiction, not precinct. It is only the last sentence that potentially narrows the counting standard down to the precinct level.

Senator Dodd, the chair of the Senate Rules Committee and the highest ranking participant in the Senate debate for the Democratic majority, also elaborated on the counting requirement in a discussion of a different HAVA provision—the first-time voter mail registrant photo ID requirement.¹²⁵ He stated that:

Any provisional ballot must be promptly verified and counted if the individual is eligible under State law to vote *in the jurisdiction*. Nothing in this conference report establishes a rule for when a provisional ballot is counted or not counted. Once a provisional ballot is cast, it is within the sole authority of the State or local election official to determine whether or not that ballot should be counted, according to State law. Consequently. . . if [a] voter otherwise

is registered but has been assigned to a different polling place, it is the intent of the authors of this bill that the poll worker can *direct the voter to the correct polling place*. In most States, the law is specific on the polling place where the voter is to cast his ballot. Again, this bill upholds state law on that subject.

Id. (emphasis added). There is an ambiguity between the statement's first two sentences and its last two.

124. *Id.* at S10493 (emphasis added).

125. See HAVA § 303(b), 42 U.S.C. § 15483(b) (Supp. III 2005).

meets the requirements as set out in State law for eligibility, the State shall count that ballot pursuant to State law.¹²⁶

This paragraph reestablishes what is missing from the actual language of HAVA § 302(a)(4), that the standard for counting a vote is eligibility in the jurisdiction. The remainder of the paragraph confirms that state law controls whether a voter is eligible in the jurisdiction, even though none of the later sentences contain the wording “in the jurisdiction.”

Senator Dodd continued:

As I stated yesterday, nothing in this bill establishes a Federal definition of when a voter is registered or how a vote is counted. If a challenged voter submits a provisional ballot, the State may still determine that the voter is eligible to vote and so count that ballot Whether a provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in section 302(a)(4) stating that a voter’s eligibility to vote is determined under State law.¹²⁷

Even though this statement is in the context of the mail registrant provision, it still leaves the counting decision in state hands.

C. *The 2004 Pre-Election Litigation Over the Provision’s Meaning*

The problem of casting and counting out-of-precinct provisional ballots incited a series of court cases in the last months of the 2004 election campaign. Various individuals and Democratic party organizations filed complaints in battleground states that had announced plans not to count such ballots, or—in more extreme circumstances—not even to issue provisional ballots to voters who showed up in the wrong precinct. The spate of litigation was sparked by a fear among Democrats that Republican election administrators in the targeted battleground states, invoking state precinct voting requirements, would improperly and unfairly deny lawfully registered voters the right to cast a provisional ballot and to have that ballot counted.¹²⁸

Over a two-week period, from October 12–26, 2004, five different trial courts and one appellate court weighed in on these issues. Their opinions contained four recurrent themes: (1) the meaning of the

126. *Id.* at S10508 (statement of Sen. Dodd) (emphasis added).

127. *Id.* at S10510.

128. *See, e.g.,* Jo Becker, *Legal Battle for Presidency Underway; Lawsuits over Election Results Pending, with Both Sides Gearing up for More*, WASH. POST, Oct. 20, 2004, at A1; Gary Martin, *‘04 Court Fight Already Is On; More than 27 Election Lawsuits Have Been Filed in Nine States*, SAN ANTONIO EXPRESS-NEWS, Oct. 25, 2004, at 1A; Vincent Sherry, *Like 2000, 2004 Raises Issue of Disfranchisement, Voter Fraud*, WASH. INFORMER, Nov. 4–10, 2004, at 1.

word “jurisdiction” in section 302(a); (2) whether this use of jurisdiction trumps state requirements to count only provisional ballots cast in the correct *precinct*; (3) the correct textual interpretation of section 302(a)(4); and (4) the importance of the various post-Conference statements on the Senate floor. Each court used one or more of these themes to justify its decision.

The first court decision was *Hawkins v. Blunt*,¹²⁹ issued on October 12, 2004. *Hawkins* was filed in a district court in Missouri shortly after the August 3 Missouri primary, on behalf of the Missouri Democratic Party and three individual plaintiffs who cast provisional ballots because their names were not on their polling place registers and they had not been sent to their correct polling places under a Missouri law that they claimed violated HAVA.¹³⁰ The court found it reasonable and not in conflict with HAVA for a voter, under the challenged state statute, to be directed to his or her correct polling place before being given a provisional ballot.¹³¹ It also found the state law reasonable and not in conflict with HAVA in requiring that, in cases where a voter so directed refused to go to that polling place, the voter would be given a provisional ballot but that it need not be counted.¹³² The court concluded that “Congress did not intend to . . . require that any person residing within one congressional district be allowed to cast a provisional ballot at any polling place within that district.”¹³³ The court then ruled on the portion of the statute stating that provisional ballots cast in the wrong polling place would not be counted.¹³⁴ The court found it “troublesome when interpreted literally” that it would “totally negate” the first three paragraphs of the statutory provision.¹³⁵ Therefore, the reference to a “wrong polling place” must be read as limited to when a voter is directed properly to the correct polling place but refuses to go.¹³⁶ By limiting the reach of the Missouri statute, the court tried to remove its ruling from the general fight over counting wrong-precinct provisional ballots.

129. *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, 2004 U.S. Dist. LEXIS 21512 (W.D. Mo. Oct. 12, 2004).

130. *Id.* at *3–4, *11–13; *see also* MO. REV. STAT. § 115.430.2 (2000 & Supp. 2005).

131. *See id.* at *29–33.

132. *Id.* at *32. *See also* MO. REV. STAT. § 115.430.2.

133. *Hawkins*, 2004 U.S. Dist. LEXIS 21512, at *32.

134. MO. REV. STAT. § 115.430.4.

135. *Hawkins*, 2004 U.S. Dist. LEXIS 21512, at *33–34.

136. *See id.* at *34.

Two days later, a district court in Ohio decided *Sandusky County Democratic Party v. Blackwell* (*Blackwell I*).¹³⁷ The plaintiffs challenged Ohio Secretary of State Kenneth Blackwell's Directive 2004-33, issued on September 16, 2004.¹³⁸ That directive, according to the plaintiffs: (1) limited access to provisional ballots to only those voters who had moved from one precinct to another, rather than providing provisional ballots to all contested voters; (2) denied provisional ballots to voters attempting to vote out-of-precinct; (3) failed to require notifying disputed voters of their right to a provisional ballot; and (4) required verification of the voter's status at the polling place on election day rather than permitting confirmation after election day.¹³⁹

The court's first finding, and potentially the most important and far-reaching for future HAVA litigation, was the affirmation that plaintiffs could avail themselves of 42 U.S.C. § 1983, a Reconstruction-era statute intended to empower newly enfranchised African-American voters to enforce their civil rights,¹⁴⁰ as a private right of action for enforcing at least the provisional voting requirement of HAVA.¹⁴¹ The court went on to support the plaintiffs and to issue the preliminary injunction.¹⁴² The basic problem with Directive 2004-33, the court explained, was that it merely reiterated Ohio state law that existed before the passage of HAVA; it had not adjusted to conform to the requirements of HAVA.¹⁴³ The judge found this particularly difficult to understand given that Secretary Blackwell had waited until September 16, 2004, to issue the directive, almost twenty-three

137. 339 F. Supp. 2d 975 (N.D. Ohio 2004).

138. *See id.* at 979–80 (reprinting Directive 2004-33).

139. *Id.* at 981.

140. 42 U.S.C. § 1983 (2000). *See also* *Monroe v. Pape*, 365 U.S. 167, 174–77 (1960) (discussing the origins of section 1 of the Ku Klux Klan Act of April 20, 1871, which later became § 1983); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1137, 1141–56 (1977) (describing the background to the enactment of § 1983).

141. *See Blackwell I*, 339 F. Supp. 2d at 981–87. While beyond the scope of this paper, the availability of § 1983 to private litigants must certainly have been a shock to those who, during the passage of HAVA, worked so hard to ensure that HAVA itself would create no private right of action. *See* 148 CONG. REC. S10505 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd) (noting that the House “simply would not entertain” a private right of action under HAVA). Their success inadvertently created the conditions for invoking § 1983. *See* 339 F. Supp. 2d at 986 (finding that statements opposing a HAVA private right of action do not show intent to disallow suit but intent not to provide a direct cause of action, opening door to § 1983 suits). It remains to be seen if other provisions of HAVA will be interpreted by the courts to be “unambiguously conferred” rights enforceable under § 1983. *See id.* at 981.

142. *Blackwell I*, 339 F. Supp. 2d at 977.

143. *See id.* at 988.

months after HAVA's enactment and just six weeks before the election.¹⁴⁴

Then the court turned to the meaning of HAVA § 302(a).¹⁴⁵ The court concluded that while HAVA did not define jurisdiction, Congress intended it to have the same meaning as "registrar's jurisdiction" in the NVRA.¹⁴⁶

The court next addressed the counting provision, section 302(a)(4). The court did not believe it was necessary to delve into the HAVA legislative history, because the plain text of HAVA required counting out-of-precinct provisional ballots cast by voters validly registered in the jurisdiction (in Ohio, the county).¹⁴⁷ The court nonetheless discussed the various floor statements cited by the defendants in support of their claim that "provisional ballots need not be allowed in the 'wrong' precinct, or, if allowed, need not be counted."¹⁴⁸ The court noted that, of the seven passages cited by defendants, the three statements by Dodd said nothing about "voting in the 'wrong' precinct."¹⁴⁹ Two of the four Bond statements discussed wrong jurisdictions, not wrong precincts.¹⁵⁰ Of the two remaining Bond statements, the court said that one, stating that poll workers may direct a voter to the correct polling place, was not in conflict with HAVA because nothing in HAVA prohibited a poll worker from informing a voter of the voter's correct polling place.¹⁵¹ Senator Bond's remaining statement, that poll workers may refuse to allow voters to vote at a wrong polling site, was more than offset by statements by Senators Dodd and Durbin that a voter has an express right to cast a provisional ballot.¹⁵²

Returning to the text of section 302(a)(4), the court interpreted the critical HAVA words "determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law," as having two independent clauses.¹⁵³ The first clause is conditional, and the second mandates counting the ballot—even if cast out-of-precinct but within the jurisdiction of registration—if the condition in the first

144. *Id.*

145. *See id.* at 988.

146. *Id.* at 990 & n.5. Here, the court cited to HAVA's legislative history for support, in contrast to its view that it was unnecessary to turn to the legislative history to interpret the counting provision generally. *See id.* at 990.

147. *Id.* at 991.

148. *Id.* at 990.

149. *Id.* at 991 n.7.

150. *Id.*

151. *See id.* at 991.

152. *See id.*

153. *Id.* at 992.

clause was met. The reference to state law in the second clause preserved for the state the right to determine how, not whether, to count the vote.¹⁵⁴ The court noted that out-of-precinct provisional ballots were to be counted only for federal offices and not for state or local offices or issues, thus doing no harm to any state interest.¹⁵⁵

The court distinguished *Hawkins* on the narrowness of the Missouri court's holding that it was permissible not to count a voter's provisional ballot when the voter, who had been directed to his or her correct precinct by poll workers in the wrong precinct, refused to go.¹⁵⁶ The Ohio directive, which absolutely prohibited counting out-of-precinct provisional ballots, was much broader.¹⁵⁷ The court also noted that the *Hawkins* court concluded that a blanket refusal to count any out-of-precinct provisional ballots probably would conflict with HAVA.¹⁵⁸

On October 20, six days after *Blackwell I*, the same court ruled on a revised Directive 2004-33 issued on October 18.¹⁵⁹ The court found that the revised directive had not cured the failings identified by the court in its October 14 preliminary injunction against the initial directive.¹⁶⁰ The new directive still failed to make provisional ballots available to all disputed voters.¹⁶¹ To be sure, the revised directive, by allowing counting of provisional ballots that had been cast in the correct precinct, satisfied one of Congress's aims: ensuring that out-of-date registration rolls at the polling place did not prevent someone assigned to that polling place from voting and having that vote counted.¹⁶² What the directive ignored were the other forms of mismanagement, well-recognized during HAVA's drafting, that cause an eligible voter's registration to be challenged and right to vote refused.¹⁶³ The revised directive also failed to require notifying voters of their right to vote provisionally and that they could vote provisionally anywhere in the county.¹⁶⁴ The court gave Secretary Blackwell until the end of the day to file a compliant directive.¹⁶⁵

154. *Id.*

155. *See id.* at 990, 993.

156. *See id.* at 993-94.

157. *Id.*

158. *Id.* at 993.

159. *See Sandusky County Democratic Party v. Blackwell (Blackwell II)*, 340 F. Supp. 2d 815, 816 (N.D. Ohio 2004).

160. *See id.* at 819-20.

161. *See id.* at 819.

162. *See id.*

163. *Id.*

164. *See id.* at 820.

165. 340 F. Supp. 2d at 823.

On October 18, a Colorado state court issued its ruling on counting out-of-precinct provisional ballots in *Colorado Common Cause v. Davidson* (CCC).¹⁶⁶ In this case, the plaintiffs challenged a state statute and an administrative rule that no provisional ballot cast in the wrong precinct would be counted, except for presidential and vice presidential elections, arguing that it violated the federal constitution, the state constitution, and HAVA.¹⁶⁷ This court, like the *Blackwell I* court, first found that section 1983 provided the plaintiffs a private right of action under HAVA.¹⁶⁸ The court found that the statute and administrative rule did not violate HAVA. In particular, the court concluded that HAVA's use of the term "jurisdiction" was ambiguous.¹⁶⁹ Relying on the plaintiffs' argument that "jurisdiction" should be given its ordinary meaning of a geographical area having some degree of political self-governance, the court stated that the word could just as easily mean "state" as it could "county."¹⁷⁰ But the court noted that the plaintiffs had conceded that HAVA did not require counting provisional ballots cast in the wrong county.¹⁷¹ The court did not discuss the relevance of the NVRA definition of jurisdiction. The court also relied on Senator Bond's post-conference floor statement about the authority of poll workers to direct voters to the correct precinct, although, as discussed above, that floor statement does not concern the counting of provisional ballots.¹⁷²

The next day, October 19, a district court in Michigan handed down a ruling in favor of counting out-of-precinct provisional ballots in *Bay County Democratic Party v. Land*.¹⁷³ First, the court agreed with the plaintiffs that they could bring a § 1983 action.¹⁷⁴ Then the court addressed the issue of whether out-of-precinct provisional ballots should be counted.¹⁷⁵ The court held that they should be counted; since the Michigan statute prescribing the qualifications to vote did

166. *Colo. Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004), available at <http://www.courts.state.co.us/exec/media/cases/04CV7709.pdf>.

167. *Id.*, at *1–2.

168. *Id.*, at *8.

169. *Id.*, at *10.

170. *Id.*

171. *Id.* The court also offered two justifications for not counting such ballots, one based on the state constitution and one on administrative practicality. *See id.* at *11.

172. *Id.*, at *11. As discussed above, that floor statement did not concern the counting of provisional ballots. *See supra* note 123 and accompanying text.

173. 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004).

174. *See id.* at 424–27.

175. *See id.* at 428.

not include precinct residency, voting out-of-precinct did not constitute failure to meet a qualification to vote.¹⁷⁶

Like the *Blackwell I* court, and relying heavily on that opinion, the *Bay County* court found that the distinction between *whether* to count a vote and *how* to count a vote was a meaningful one.¹⁷⁷ The court's bottom line was that states retained the power to organize voting on the basis of precincts and otherwise to enforce precinct-based voting. They could require voters to vote in-precinct, direct voters to their correct precinct, accept regular ballots only from those voting in precinct, and even criminally punish voters who intentionally voted out-of-precinct.¹⁷⁸ But, finding support from both *Hawkins* and *Blackwell*, the court held that states may not refuse to count a provisional ballot for federal races cast out-of-precinct but within the proper jurisdiction.¹⁷⁹

Finally, the court dismissed the defendants' arguments that counting the votes of people voting out-of-precinct would cause vote dilution; the court held so on the grounds that the vote would count only for races for which the voter was eligible to vote.¹⁸⁰ For instance, for jurisdictions having more than one member of the House, the vote would only count if cast for candidates for the seat in the voter's actual congressional district. If the out-of-precinct ballot included a vote for a House candidate in a different district, that part of the ballot would not be counted.

Two days later, a district court in Florida ruled on the provisional ballot issue in *Florida Democratic Party v. Hood (FDP)*.¹⁸¹ Like the prior courts, this district court found that § 1983 was available to the plaintiffs.¹⁸² The court also upheld plaintiffs' arguments that voters must be allowed to cast provisional ballots.¹⁸³ But the court disagreed with plaintiffs as to their right to have out-of-precinct provisional ballots counted.¹⁸⁴ This court interpreted HAVA as requiring the state to take the time to determine, with the more "perfect knowledge" available after election day, whether the person was eligible under state law broadly, to vote at any polling place, or only narrowly to vote at the

176. See *id.* at 430–31.

177. *Id.* at 431–32.

178. *Id.* at 432.

179. See *id.* at 432–34.

180. *Id.* at 436.

181. 342 F. Supp. 2d 1073, 1083 (N.D. Fla. 2004).

182. See *id.* at 1077–78.

183. *Id.* at 1081.

184. See *id.* at 1079–80.

polling place where the provisional ballot was cast.¹⁸⁵ The judge rejected the plaintiffs' broader reading of "eligible" as meaning eligibility to vote in the election, without regard to polling place. In doing so, he relied on his interpretation of the post-Conference statements of Senator Bond, but he mistakenly attributed to Senator Dodd Senator Bond's comment that HAVA does not require out-of-jurisdiction ballots to be counted.¹⁸⁶ For this judge, the HAVA phrases "registered voter in the jurisdiction," "eligible to vote in an election for Federal office," and "eligible to vote in that election" were not controlling because they did not appear in section 302(a)(4).¹⁸⁷

The final court action on provisional ballots was Ohio Secretary of State Kenneth Blackwell's appeal to the Sixth Circuit Court of Appeals, which was decided on October 26 (*Blackwell II*).¹⁸⁸ The appellate court affirmed the availability of § 1983¹⁸⁹ but, in sweeping language, rejected the district court's ruling on the counting standard.¹⁹⁰ Noting that at least twenty-seven states count only in-precinct votes,¹⁹¹ the court sided with the *FDP* court's interpretation that HAVA's provisional voting section was intended to correct for imperfect knowledge at the poll on election day.¹⁹²

The Sixth Circuit reviewed HAVA's use of the word "jurisdiction" and concluded that the *Blackwell I* court was wrong to derive a congressional intent to ascribe the NVRA meaning to the word.¹⁹³ The court found that Senator Dodd's statement about the NVRA definition¹⁹⁴ was outweighed by the last two sentences of Senator Bond's comment on the counting requirement and the last sentence in Senator Bond's colloquy with Senator McConnell, both of which discuss state law requirements to vote at specific polling places.¹⁹⁵ The appellate court concluded that HAVA did not define "jurisdiction" and that the term had too many meanings to compel the conclusion that it meant, in the Sixth Circuit's words, the "geographic reach of the unit of gov-

185. *See id.*

186. *See id.* at 1080 n.7; *see also supra* note 123.

187. *See id.* at 1080–81.

188. 387 F.3d 565 (6th Cir. 2004). The defendants in *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004), also filed an appeal with the Sixth Circuit, but the two cases were consolidated. *Bay County Democratic Party v. Land*, No. 3044720-1 (6th Cir. Oct. 23, 2004) (order granting motion to consolidate).

189. 387 F.3d at 572–73.

190. *See id.* at 568.

191. *Id.* at 568 & n.1.

192. *See id.* at 570.

193. *Id.* at 574–75 & n.4.

194. *See supra* note 116 and accompanying text.

195. *Id.* at 575. *See also supra* notes 122–24 and accompanying text.

ernment that maintains the voter registration rolls.”¹⁹⁶ Furthermore, even if the term “jurisdiction” did have that meaning, it only affected the standard for casting, not counting.¹⁹⁷

The Sixth Circuit also rejected the district court’s two-clause interpretation of the section 302(a)(4) counting provision.¹⁹⁸ The appellate court relied on Senator Bond’s statement disavowing intent to overturn state counting laws for out-of-*jurisdiction* ballots¹⁹⁹ and the last sentence of Senator Dodd’s statements regarding mail registrants²⁰⁰ to demonstrate that there was no clear congressional intent to overturn state counting laws.²⁰¹ For this court, HAVA was “quintessentially about being able to *cast* a provisional ballot,”²⁰² not to have it counted.²⁰³

The Sixth Circuit decision was the last of the pre-election litigation regarding out-of-precinct provisional ballot counting. There was no time remaining in the six days before the election to appeal these decisions or pursue some of the other pending cases. On November 3, the day after the election, the Kerry campaign decided that there were not enough provisional ballots in Ohio to create a meaningful chance for Kerry to capture Ohio’s electoral votes.²⁰⁴ Thus, appeals became meaningless.

In all of these cases, the use of HAVA’s legislative history is somewhat ironic. The Democratic litigants and the more liberal judges in Ohio and Michigan took a textual approach to statutory interpretation,²⁰⁵ while the Republican litigants and the more conservative judges in Florida and the Sixth Circuit Court of Appeals took the

196. *See id.*

197. *See id.* at 578–79 & n.5.

198. *See id.* at 577.

199. *Id.* at 578 (citing 148 CONG. REC. S10491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond)) (“It is not the intent of the authors to overturn State laws regarding registration or state laws regarding the jurisdiction in which a ballot must be cast to be counted.”)); *see supra* note 122 (discussing Bond’s statement in the legislative history).

200. *Id.* (citing 148 CONG. REC. S10510 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd)) (“Whether a provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in section 302(a)(4) stating that a voter’s eligibility to vote is determined under State law.”)); *see supra* note 127 and accompanying text (discussing Dodd’s statement in the legislative history).

201. *See id.*

202. *Id.* at 576.

203. *Id.* at 578.

204. *See* Balz, *supra* note 13.

205. *See supra* Part II.

approach associated with “judicial activism”²⁰⁶—relying heavily on post-conference floor statements from only one house of Congress and, even more surprisingly, on the statements of a senator in the minority, Senator Bond. Furthermore, when the various courts delved into the floor statements of Senators Bond and Dodd, they did so in a selective way that did not fully convey what the two senators were saying.²⁰⁷

*D. The EAC’s Survey of Provisional Ballot Casting
and Counting in 2004*

With the help of a United States Election Assistance Commission (EAC) survey completed in the fall of 2005²⁰⁸ and some ancillary analysis by the Government Accountability Office in a report completed in June 2006,²⁰⁹ we now have the opportunity to review the magnitude of the effect of the precinct limitations on provisional balloting in the 2004 election.

The EAC conducted a survey on twelve different general election topics, including the casting and counting of provisional ballots, and received questionnaire responses from 6,568 local election administration jurisdictions (i.e., county or township election administrators).²¹⁰ The report’s primary author, Kimball Brace, found that the jurisdictions reported that 1,901,591 provisional ballots had been cast, and 1,225,915 (64.5%) of those cast had been counted.²¹¹ The provisional ballots cast represented 2.56% of all ballots cast in polling places on the day of the election.²¹²

206. See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 7 (“[J]udicial use of legislative history enables and perhaps encourages judicial activism.”)

207. See *supra* Part IV.B.3.

208. See EAC SURVEY, *supra* note 17. The EAC was created by HAVA § 201–10, 42 U.S.C. §§ 15321–30 (Supp. III 2005).

209. See U.S. GOV’T ACCOUNTABILITY OFFICE, ELECTIONS: THE NATION’S EVOLVING ELECTION SYSTEM AS REFLECTED IN THE NOVEMBER 2004 GENERAL ELECTION (2006) [hereinafter GAO REPORT].

210. See EAC SURVEY, *supra* note 17, at Executive Summary 1, 3; see also U.S. ELECTION ASSISTANCE COMM’N, A SUMMARY OF THE 2004 ELECTION DAY SURVEY: HOW WE VOTED: PEOPLE, BALLOTS, & POLLING PLACES, 7 tbl.1 (2005) [hereinafter EAC SUMMARY].

211. See EAC SURVEY, *supra* note 17, at Executive Summary 5.

212. *Id.* at Executive Summary 5, Provisional Ballots 6–5. The GAO estimated that between 1.1 million and 1.7 million provisional ballots had been cast. GAO REPORT, *supra* note 209, at 243. The wide range was the result of an estimated 20 percent of GAO’s surveyed jurisdictions’ failing to provide data on provisional ballots cast. *Id.* The GAO did not estimate the number of counted provisional ballots because of the very large number (40 percent) of jurisdictions not providing that data. *Id.*

The EAC analysis reached nineteen general conclusions about provisional ballots, five of which we discuss here. First, jurisdictions permitting the counting of out-of-precinct ballots nonetheless cast in the proper jurisdiction had higher rates of provisional ballots cast and much higher rates of counting such ballots than did other jurisdictions.²¹³

Second, there was a much higher rate of casting provisional ballots in Voting Rights Act § 203 language minority jurisdictions, in which ballots must be offered in languages other than English²¹⁴—more than half (over one million) of all provisional ballots cast were cast in section 203 jurisdictions. Of all ballots cast in section 203 jurisdictions, 5.09% were provisional, compared to 1.38% for other jurisdictions.²¹⁵ While section 203 jurisdictions counted such ballots at a slightly higher rate than other jurisdictions, that rate “could not offset the much higher incidence of casting provisional ballots.”²¹⁶

Third, urban and other high population density areas had both higher rates of casting and of counting provisional ballots than rural and other low population density areas. The smallest jurisdictions (voting age populations of less than one thousand) had rates of casting as low as 0.08% of all polling place ballots cast, while the rates reached 6.08% in the largest (voting age populations of greater than one million).²¹⁷

Fourth, the rates of counting provisional ballots tended to increase with the average income and educational level of a jurisdiction, with higher income jurisdictions counting nearly twice as many provisional ballots cast (69.30–75.90%) as low-income jurisdictions (39.80%).²¹⁸ In the least-educated jurisdictions, the counting rate of provisional ballots was as low as 52.60%, while it rose to 72.30% for jurisdictions with the highest education level.²¹⁹

213. See EAC SURVEY, *supra* note 17, at Provisional Ballots 6-6. As previously noted, not all states count out-of-precinct ballots. See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 568 & n.1 (6th Cir. 2004) (stating that at least twenty-seven states and the District of Columbia required counting ballots only if cast in the correct precinct); GAO REPORT, *supra* note 209, at 235 fig.45, 236 (finding that thirty-two states and the District of Columbia had such a restriction; fourteen states permitted counting provisional ballots cast anywhere within the relevant county, or in Washington’s case, within the state; four states were exempt from provisional voting).

214. 42 U.S.C. § 1973b(f) (2000); see generally Tucker, *supra* note 9, at XXX.

215. See EAC SURVEY, *supra* note 17, at Provisional Ballots 6-11.

216. See *id.* at Provisional Ballots 6-6, 6-11.

217. See *id.* at Provisional Ballots 6-7, 6-10.

218. *Id.* at Provisional Ballots 6-6, 6-10.

219. *Id.* at Provisional Ballots 6-6, 6-11.

Finally, jurisdictions in states with statewide voter registration databases had noticeably lower rates of casting provisional ballots—almost half of the rate for other jurisdictions—suggesting that better administration of voter rolls may contribute to lowering the need for provisional ballots.²²⁰

The EAC also asked the states to provide statewide summaries identifying the most common reasons for rejecting provisional ballots without providing standard definitions for the potential reasons and without asking the states to provide the actual number of ballots rejected for each reason.²²¹ The five most common reasons submitted were: (1) voter not registered (eighteen states); (2) voting in the wrong precinct (fourteen states); (3) improper ID (seven states); (4) incomplete ballot form (six states); and (5) voting in the wrong jurisdiction (five states).²²² Although the EAC Survey questionnaire did not define categories of possible reasons, the response rates for the top five reasons are sufficiently different to establish the relative importance of the precinct constraint as a reason for not counting a provisional ballot.

The EAC Survey also found that, of the forty-six states that had rules for whether to count only provisional ballots cast within the proper precinct or within the jurisdiction generally, twenty-eight only counted those cast within the proper precinct, while eighteen permitted the counting of such ballots cast anywhere within the jurisdiction.²²³ Yet the data on the most common reasons for rejecting provisional ballots show only fourteen states mentioning the precinct restriction as one of the most common reasons for refusing to count provisional ballots.²²⁴ Hopefully, the EAC's 2006 Election Day Survey will provide more meaningful information about the magnitude of the out-of-precinct problem.

220. *Id.* at Provisional Ballots 6-6, 6-12.

221. *Id.* at Provisional Ballots 6-5. The EAC did not provide standard definitions for these reasons or ask the states to report the number of ballots rejected for each reason.

222. *Id.*

223. *Id.* at Introduction 12.

224. *Id.* at Introduction 12, Provisional Ballots 6-5.

IV.

FROM PROVISIONAL BALLOT TO ACTUAL VOTE: LESSENING THE
FRICTION BETWEEN JURISDICTIONS, POLLING PLACES,
AND PRECINCTSA. *Where the Courts Went Wrong*

Given the magnitude of the out-of-precinct problem, interpretation of HAVA's provisions remains of great importance to upcoming elections. The courts' interpretations in 2004 are not definitive. Other courts likely will be called on to reexamine the problem. We believe that the restrictive rulings of *Blackwell II* and *FDP* should not mark the end of the debate. The HAVA text, the context of its enactment, and its underlying premises provide more support for counting the federal portion of out-of-precinct provisional ballots than those courts were willing to recognize. We also believe that the Senate floor statements, made after the enactment of the Conference report by the House and without consultation with other leading conferees, should not control the interpretative debate. Even if they did, a careful reading shows them not supporting states' in-precinct restrictions.

All the courts that discussed the need to resort to HAVA's legislative history began with the same analytic framework. The starting point for determining congressional intent was the plain meaning of the words of the statute. If there were ambiguities in the text, or if the text would lead to illogical results, the legislative history could be used as a supplement.²²⁵ Yet in applying this framework, the courts came to different conclusions regarding the need to use legislative history. The *Hawkins* court found the text clear but buttressed its analysis with legislative history anyway.²²⁶ In *Blackwell I*, the district court also found the text clear and that the legislative history supported the text.²²⁷ In *Bay County*, the court found the statute clear and no need to resort to legislative history.²²⁸ The *FDP* court found a reasonable reading of the text comported with a "remarkably clear and consistent" legislative history.²²⁹ The *CCC* court and the *Blackwell II* court found the text ambiguous and thus had to resort to the legislative

225. See *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, 2004 U.S. Dist. LEXIS 21512, at *15 (W.D. Mo. Oct. 12, 2004); *Sandusky County Democratic Party v. Blackwell (Blackwell I)*, 339 F. Supp. 2d 975, 990 (N.D. Ohio 2004); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 427 (E.D. Mich. 2004).

226. See *Hawkins*, 2004 U.S. Dist. LEXIS 21512, at *23-26.

227. See *Blackwell I*, 339 F. Supp. 2d at 990-91.

228. See *Bay County*, 347 F. Supp. 2d at 427.

229. *Fla. Democratic Party v. Hood*, 347 F. Supp. 2d 1073, 1080 & n.7 (N.D. Fla. 2004).

history.²³⁰ These discrepancies are not unusual given that a plain-text-first approach still leaves a great deal of subjective discretion in the hands of the judges reviewing a statute. The methodology for statutory interpretation has always been an unsettled area of American law and will remain so. In the words of Justice Scalia, “[w]e American judges have no intelligible theory of what we do most.”²³¹

Here, a textual examination in isolation offers no definitive answer. Until the deletion of the phrase “in the jurisdiction” in the conference committee, there was no conflict between section 302(a)(4) and the earlier portions of section 302(a). Both contained “jurisdiction,” and section 302(a)(4) explicitly would have required counting provisional ballots cast by persons eligible to vote in the jurisdiction.²³² With the deletion, the analysis obviously became more problematic. There is nothing in the public record to tell us specifically why the deletion occurred, let alone that it was intended to unlink section 302(a)(4) from section 302(a)(2). While a strictly textual analysis can be used to support finding that the counting provision is unlinked from the casting provision (e.g., the *inclusio unius*²³³ implication of Congress including “jurisdiction” in the casting provision but not in the counting provision), one could make a case, albeit still subjective, for the existence of “compelling” evidence of a contrary legislative intent—that, despite the omission in section 302(a)(4), HAVA requires the counting of out-of-precinct provisional ballots confirmed to have been cast by voters eligible to vote in the jurisdiction. We, however, prefer a less formalistic and more pragmatic statutory interpretation methodology.

The various intentionalist²³⁴ and pragmatic approaches²³⁵ all look for independent evidence of the intent of the legislators. These approaches inevitably rely on legislative history, and questions imme-

230. See *Colo. Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *10–11 (D. Colo. Oct. 18, 2004), available at <http://www.courts.state.co.us/exec/media/cases/04CV7709.pdf>; *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 578 (6th Cir. 2004).

231. SCALIA, *supra* note 23, at 14.

232. See *supra* notes 114–19 and accompanying text.

233. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 21, at 263–64 (describing the canon of *inclusio unius* as indicating that if “Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,” but finding the canon unreliable).

234. See *generally id.* at 221–30 (outlining intentionalist approach to statutory interpretation).

235. See *generally id.* at 249–52 (describing pragmatic theory of statutory interpretation).

diately arise as to which parts of the legislative history are most authoritative. Eskridge, Frickey, and Garrett divide the issue of evidence of collective legislative intent into two subordinate issues: problems of aggregation (did a majority that voted on the bill agree with the individual speaker's or writer's interpretation?) and problems of attribution (identifying the pivotal legislators whose statements might disclose Congress's actual intent).²³⁶ Tautologically, the thinnest component of legislative history is that of floor statements by the minority party in one house after the passage of the conference report in the other. Here, even if we give weight to the comments of Senator Bond, the balance of the legislative history still supports the view that the conference's deletion of "jurisdiction" was without import.

As floor leader for the majority, Senator Dodd's post-conference remarks have more weight. They also can be read as more ambiguous. His remarks still focus on eligibility in the jurisdiction, which was the counting standard as it existed when the bill passed the Senate. Given Dodd's overall pro-voter stance on election reform,²³⁷ it is hard to believe that he would intentionally limit the counting of provisional ballots based on out-of-precinct rules through these floor statements.

As for the House's legislative history, there is no indication that the primary sponsors ever retreated from their position, stated in the Committee report accompanying the House bill, of interest in providing countable provisional ballots when a voter appears at the wrong precinct.²³⁸

On balance, we believe that the reasonable reading of the legislative history is that the deletion in conference was not meant to be substantive. The smattering of comments relied on by the courts with more restrictive interpretations do not overcome the problems of aggregation of the contrary evidence.

Furthermore, the logic of the 2004 rulings in favor of the defendants, especially in Ohio, collapses when considering the case of a single polling place that serves multiple precincts. While there is a one-to-one relationship between many of the estimated 185,000 polling places in the United States and precincts, this is frequently not the

236. *See id.* at 224–25.

237. *See, e.g.*, Senator Chris Dodd, Announcing Conference Agreement on Election Reform Legislation (Oct. 4, 2002), http://www.senate.gov/~dodd/press/Speeches/107_02/1004.htm.

238. H.R. REP. NO. 107-329, pt. 1, at 37–38 (2001); *see supra* notes 106–09 and accompanying text.

case.²³⁹ Indeed, in some dense urban areas, a single polling place may serve as the physical voting location for voters living in two or more precincts.²⁴⁰ Voters in urban areas may arrive at their assigned polling place, see that it contains multiple precinct lines, and either join, or are directed to, the wrong line.²⁴¹

In cases where a polling place serves two or more precincts, separate registration lists corresponding to those precincts may be deployed at the polling place, and the individual precincts may even have separate voting machines, voting areas, and separate teams of election workers.²⁴² In a well-managed polling place, the error will likely be quickly detected, and the voter will probably find his or her way to the correct precinct line and vote a regular ballot without incident. In a poorly managed polling place, the error may not always be detected, and the voter may be informed that his or her name is not on the registration roll for that precinct. In that scenario, the voter will have no choice but to cast a provisional ballot, even though the designated precinct, and the registration roll with that voter's name, is not a few miles or even blocks away, but mere feet. A voter who ends up in the wrong precinct line at the right polling place and votes provisionally because of poorly trained poll workers unable to direct him to the right precinct line has no more chance of having his ballot counted than does a voter who happens to vote provisionally in the wrong polling place. The remedy afforded by section 302(a) as interpreted by the court rulings for the defendants (allowing voters to cast provisional ballots, but not requiring that they be counted) is of no more use to the former than it is to the latter. The Sixth Circuit ruling in *Blackwell II*—allowing voters to cast provisional ballots but not requiring that they be counted—is of no use to these voters and effectively perpetuates much of the problem section 302(a) was intended to solve. The only “benefit” remaining to wrong-line voters is that they

239. See, e.g., GA. CODE ANN. § 21-2-2(28) (2006); 10 ILL. COMP. STAT. 5/1-3(13); MICH. COMP. LAWS ANN. § 168.654 (West 2005); NEB. REV. STAT. § 32-114 (2005); OHIO REV. CODE ANN. § 3501.01(Q) (West 2006); 25 PA. STAT. ANN. § 2602(g) (2006); TENN. CODE ANN. § 2-1-104(18) (2005); VA. CODE ANN. § 24.2-101 (2003).

240. See Stuart Pfeifer, *Multi-Precinct Polls Blamed for Mix-Up*, L.A. TIMES, Mar. 21, 2004, at B.5 (noting that “in many instances, two or more precincts had been consolidated into one polling station”).

241. See Miles Rapoport, *Provisional Ballot Problems Loom for November 7, According to New Publication*, U.S. NEWSWIRE, Oct. 17, 2006 (describing how “something as simple as getting in line for the wrong precinct” cost citizens their votes in Lucas County, Ohio in 2004); Ford Fessenden, *A Rule to Avert Balloting Woes Adds to Them*, N.Y. TIMES, Aug. 6, 2004, at A1 (provisional ballot not counted when voter was at wrong polling place but correct one was ten feet away in high school gym).

242. See *id.*

walk away thinking they may have exercised their franchise, whereas before HAVA they walked away knowing they had not. Such short-term psychological satisfaction to the voter and the minimization of disruptions at the polling place were not what HAVA intended. HAVA's main purpose was to secure the federal portion of the franchise for people who are entitled to vote in federal elections, even if that imposed additional duties on election offices.

B. Options for Improving Efficiency at the Precinct Level

Our research leads us to conclude that there is a need for a public debate about the utility of precincts, the way in which they are defined, the legitimacy of disqualifying federal ballots cast in the correct jurisdiction but incorrect precinct, and, most fundamentally, whether precincts conceptually are obsolete and should be abolished. We do not recommend any particular outcome, but we are persuaded that there is no meaningful rationale for the rules or patterns we currently have.

Two of the most obvious options for change are substantially raising or eliminating the maximum number of people assignable to a precinct and/or assigning a minimum number of people per precinct. The effect of such changes would be to reduce the total number of precincts in a jurisdiction. This in turn would simplify the bookkeeping associated with assigning voters to precincts, reduce errors in registration rolls, and minimize the likelihood that a voter will go to the wrong voting place on election day. But any proposal to remove the constraints that result in unduly small precincts must also provide direction to jurisdictions to ensure that reconfigured precincts actually aid voters. The overriding public policy interest must always be to benefit the eligible voter and minimize the chances that he or she will be forced to cast a provisional ballot. Another option is to have the EAC, with the help of the U.S. Census Bureau (or any other agency whose work involves social science analysis) make recommendations as to the logical area footprints for precincts. Additionally, responsibility for defining precincts could be moved from the counties to the state in order to assure uniformity within a state.

While these changes may initially impose additional burdens on already overworked election administrators, they will, in the long run, benefit voters and election administrators alike. After all, provisional ballots are a response to the confusion that arises from imperfections in how precinct boundaries are drawn, how voter registrations are processed and maintained, and how poll workers are trained. To the degree that these imperfections are minimized, recourse to provisional

ballots will decline, sparing election officials the considerable task of qualifying and counting provisional ballots in the days following the election.

C. Vote Centers: A Possible Solution to the Problem of Precincts

So far, we have been discussing voting constrained by requirements to vote in one's precinct. As noted in the EAC survey data, a number of states avoid the conflict between provisional balloting and precinct structure by allowing the counting of provisional ballots cast anywhere within the jurisdiction,²⁴³ and one state, Washington, permitted casting provisional ballots anywhere within the state even before HAVA's enactment.²⁴⁴ But there is an alternative experiment, led by Colorado, to overcome the rigidities of precincts altogether.

I. The Success of Vote Centers in Larimer County

In 2003 and 2004, Larimer County became the first of Colorado's counties to shift, on an experimental basis, to a different model—vote centers.²⁴⁵ Larimer County, like other jurisdictions, was faced with the prospect of implementing HAVA's accessibility requirements. Recognizing the costs of such implementation, the county came up with the idea of expanding the concept of early voting centers, in which voters can cast their vote in-person at certain locations prior to election day,²⁴⁶ to election day itself.²⁴⁷ Larimer County consolidated more than 140 existing precincts into twenty-two vote centers where all voters in the jurisdiction could cast their votes at any one of the vote centers anywhere in the county—wherever was most convenient, near home, near work or somewhere else.²⁴⁸ This model, like voting at the county board of election's central office or at an early voting center, is without precinct constraints.

In May 2004, based on the success of the experiment, the Colorado Legislature enacted a statute permitting any of Colorado's coun-

243. See EAC SURVEY, *supra* note 17, at Provisional Ballots 6-2, 6-12.

244. See FORD-CARTER, *supra* note 88, at 35–36 (discussing Washington's provisional ballot program and recommending that every state adopt a similar program).

245. See ELECTIONLINE.ORG, ELECTION REFORM: WHAT'S CHANGED, WHAT HASN'T AND WHY, 2000–2006, at 42 (2006), <http://electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf>.

246. See Nat'l Conference of State Legislatures, Absentee and Early Voting, <http://www.ncsl.org/programs/legismgt/elect/absentearly.htm> (last visited Feb. 7, 2007).

247. See Welcome to the Virtual Courthouse of Larimer County Colorado, Elections: Vote Centers History, http://www.co.larimer.co.us/elections/votecenters_history.htm (last visited Dec. 4, 2006) [hereinafter Larimer County Vote Centers History].

248. *Id.*

ties to create its own vote centers.²⁴⁹ The statute defines a vote center as “a polling place at which any registered elector in the political subdivision holding the election may vote, regardless of the precinct in which the elector resides.”²⁵⁰ In order to ensure an adequate number of vote centers, the statute required that counties with populations of twenty-five thousand or more active registered voters create at least one vote center for every ten thousand active registered voters.²⁵¹ Equally as important, the statute required that each vote center had to have a secure electronic connection to the county-wide computerized registration book so that all voting information processed by any vote center computer was immediately accessible to every other county vote center.²⁵² The goal was to prevent any voter from voting more than once by traveling from one vote center to another.²⁵³ Finally, the statute limited the use of vote centers to counties that first used them in an off-year election or in a primary election.²⁵⁴

After Larimer County’s experimental use of vote centers in 2003, it used them again in the 2004 general election, again with great success.²⁵⁵ The county again combined its 143 precincts, this time into 31 vote centers.²⁵⁶ The county required each center to have 1,500 to 2,500 square feet of internal space, have adequate parking (eighty spaces), and be compliant with disabilities accessibility laws.²⁵⁷ The vote centers created additional economies of scale by greatly reducing the number of necessary election judges, allowing the county to select the most effective poll workers,²⁵⁸ and increasing poll watcher effi-

249. 2004 Colo. Sess. Laws 1104 (codified as amended at COLO. REV. STAT. § 1-5-102.7 (2005)).

250. COLO. REV. STAT. § 1-1-104(49.8) (2005).

251. § 1-5-102.7(3).

252. § 1-5-102.7(4).

253. *See id.*

254. § 1-5-102.7(7).

255. *See* Kay J. Maxwell, President, League of Women Voters, Statement Before the Commission on Federal Election Reform 2–3 (Apr. 18, 2005), available at http://www.co.larimer.co.us/elections/Kay_Maxwell_LWV.pdf.

256. *See* Welcome to the Virtual Courthouse of Larimer County Colorado, Elections: Vote Center Statistics, http://www.co.larimer.co.us/elections/votecenters_statistics.htm (last visited Oct. 25, 2006); Larimer County Vote Centers History, *supra* note 247.

257. *See* Welcome to the Virtual Courthouse of Larimer County Colorado, Elections: Criteria for Selecting a Vote Center Site, http://www.co.larimer.co.us/elections/votecenters_criteria.htm (last visited Oct. 25, 2006); Scott Doyle, Larimer County Clerk & Recorder, Vote Centers Help America Vote, Report to the AEI-Brookings Election Reform Project (Apr. 12, 2006), available at <http://www.brookings.edu/gs/projects/electionreform/20060418Doyle.pdf> [hereinafter Doyle Report].

258. *See id.*; NAT’L TASK FORCE ON ELECTION REFORM, NAT’L ASS’N OF ELECTION OFFICIALS, ELECTION 2004: REVIEW & RECOMMENDATIONS BY THE NATION’S ELEC-

ciency.²⁵⁹ In the 2004 general election, the vote centers handled a remarkable turnout of 95%, with voting finished by 7 p.m. and no end-of-day lines.²⁶⁰ Of the 147,112 votes cast in the county, 2,636 provisional ballots were cast (1.8% of votes cast).²⁶¹ Of the 2,636 provisional ballots cast, 1,798 (68%) were counted.²⁶² None of the rejected provisional ballots were rejected for being cast out-of-precinct because that possibility had been eliminated by the county-wide voting possibility within each center.²⁶³

Critical to the success of the Larimer County vote centers was their placement. Almost half of Larimer County's 275,000 residents live in and around the city of Fort Collins, and the city borders Interstate 25, which bisects the county.²⁶⁴ A great many voters use I-25 to get to work in Denver, so the county placed most of the vote centers in Fort Collins and all but four of the centers within close proximity of an I-25 exit.²⁶⁵

Support for vote centers is spreading. Based on the apparent success of vote centers in Larimer County, a number of Colorado counties used vote centers in the 2006 election.²⁶⁶ The new counties faced some administrative difficulties,²⁶⁷ but despite this setback vote cen-

TIONS ADMINISTRATORS 33 (2005), available at <http://www.electioncenter.org/documents/Task%20Force%20Final%20PDF.pdf> [hereinafter NAT'L TASK FORCE ON ELECTION REFORM 2004].

259. NAT'L TASK FORCE ON ELECTION REFORM 2004, *supra* note 258, at 34.

260. See Doyle Report, *supra* note 257.

261. See Welcome to the Virtual Courthouse of Larimer County Colorado, Elections: Larimer County Clerk & Recorder Election Years Totals, http://www.co.larimer.co.us/elections/election_stats.htm (last visited Jan. 29, 2007).

262. See *id.*; Scott Doyle, Larimer County's Clerk & Recorder, noted that 2,636 provisional ballots were cast and 1,796 were counted. Email from Scott Doyle, Larimer County Clerk & Recorder, to Leonard Shambon (June 26, 2006) (on file with the *New York University Journal of Legislation and Public Policy*) [hereinafter Doyle Email].

263. Doyle Email, *supra* note 262.

264. See Doyle Report, *supra* note 257; Doyle Email, *supra* note 262.

265. See Welcome to the Virtual Courthouse of Larimer County Colorado, Elections: Vote Centers Map—Entire County, http://www.larimer.org/maps/vote_centers.cfm?city=ALL (last visited Oct. 25, 2006); Doyle Email, *supra* note 262.

266. See Interview with Dana Williams, Public Information Officer, Elections Division, Office of the Secretary of State of Colorado (Oct. 6, 2006) (noting that 20 counties planned to use vote centers for the 2006 election) (on file with the *New York University Journal of Legislation and Public Policy*). See also Monte Whaley & Joey Bunch, *Vote Centers a "Total Fiasco"*, DENVER POST, Nov. 9, 2006, at B.1.

267. See *id.* (noting that the use of vote centers in Larimer County in 2003 had been a "huge success" but that there were numerous problems with vote centers across Colorado in the 2006 election); Susan Barnes-Gelt, *What Went Wrong in Denver*, DENVER POST, Nov. 12, 2006, at E.04 (noting that moving to vote centers "required technological adaptations that Denver was unprepared to handle").

ters still show promise. In a May 2005 report, the Election Center's National Task Force on Election Reform recommended that the states amend their election laws to permit the creation of vote centers within jurisdictions.²⁶⁸ The Task Force concluded that vote centers should be one option available for making election day voting as efficient, economical, and voter-friendly as possible.²⁶⁹ In July 2005, the report of a forum sponsored by the League of Women Voters Education Fund and the McCormick Tribune Foundation noted vote centers as one way of " 'think[ing] outside the box' about ways to streamline the voting process."²⁷⁰ Indiana sent a delegation to Larimer County to observe an election and produced a detailed report in December 2005 advocating that Indiana consider the viability of voting centers.²⁷¹ One Indiana county will serve as a vote center pilot county in 2007.²⁷² And in Missouri, one county already uses vote centers (called "central polls" in that county) to supplement its existing precinct structure.²⁷³

2. Cost Concerns

There has been criticism of vote centers, especially of using them in rural areas,²⁷⁴ based on the possibility of increased travel distances, which have been shown to negatively impact turnout.²⁷⁵ The political

268. See NAT'L TASK FORCE ON ELECTION REFORM 2004, *supra* note 258, at 9, 33–35. The Task Force was composed of current and former state and local election administrators, and the Election Center is also known as the National Association of Election Officials. See *id.* at iii–iv; Election Center, About the Election Center, <http://www.electioncenter.org/about.html> (last visited Feb. 2, 2007).

269. See *id.* at 35.

270. LEAGUE OF WOMEN VOTERS, NEXT STEPS ON ELECTION REFORM 10 (2005), available at http://www.lwv.org/Content/ContentGroups/Publications/VoterInformation/voting_nextsteps_bw.pdf.

271. See OFFICE OF IND. SEC'Y OF STATE, A STUDY OF VOTE CENTERS & THEIR APPLICABILITY TO THE HOOSIER ELECTION PROCESS 9 (2005), available at <http://www.ai.org/sos/elections/hava/pdf/VoteCenters.pdf>, at 3, 9–12.

272. Todd Rokita, Indiana Secretary of State, Rokita Announces Tippecanoe County as Vote Center Pilot (Sept. 25, 2006), available at <http://www.in.gov/sos/press/2006/09252006.html>.

273. See William H. Woodwell, Jr., *Thinking Outside the Ballot Box*, NAT'L VOTER, June 2006, at 4, 5 (describing Boone County's system and noting its usefulness for students at the University of Missouri and others who are new to the county or have changed their address).

274. See, e.g., M. Mindy Moretti, *Bigger Is Not Always Better: Vote Centers, Consolidation Draw Complaints*, ELECTIONLINE WEEKLY, Jan. 26, 2006, <http://electionline.org/Newsletters/tabid/87/ctl/Detail/mid/643/xmid/172/xmfid/3/Default.aspx> (noting "push back" from some rural areas and quoting Wayne Pruett, former administrator of elections for Sumner County, Tennessee, who believed that vote centers "discriminate[] against the smaller rural community precincts").

275. See *id.* See also Robert M. Stein & Greg Vonnahme, Election Day Vote Centers 6 (Apr. 2006) (prepared for presentation at the Annual Meeting of the Midwest

science literature, beginning with the work of Anthony Downs in 1957, has tied the cost of voting largely to the time and inconvenience of the act of voting.²⁷⁶ The “obstacles or nuisances” to voting include waiting in long lines to vote as well as relatively inaccessible voting places because of the distance to travel, limited parking, etc.²⁷⁷

Despite the possibility of increased travel, one of the few studies of the effect of election day vote centers shows that vote centers may actually encourage turnout.²⁷⁸ Robert Stein and Greg Vonnahme compared the 1992–2004 voting histories of a random sample of voters in Larimer County and neighboring Weld County, which did not employ vote centers during the relevant period, matched for age, gender, and voting history.²⁷⁹ They found a non-negligible increase (a 95% probability of a 2.5–7.1%) in turnout from the use of vote centers.²⁸⁰ This positive effect on turnout from vote centers may stem from the net reduction in time and inconvenience. Recent studies have examined the impact of moving polling places farther from voters’ homes,²⁸¹ but vote centers, by contrast, allow the voter to use a polling site close to work or school or shopping or other activities. The net commute to the polling center from one of those destinations, a destination the voter would have gone to in any event, could easily be shorter than the distance from home to the old precinct-based polling place. The positive effect for the voter is further enhanced by the economies-of-scale efficiencies within the vote center itself.²⁸²

There is little additional academic literature studying the impact of polling place distance on turnout rates, and the studies that do exist consider only distance from a voter’s residence. In 2003, James Gimpel and Jason Schuknecht published a study that first reviewed past literature suggesting that a non-trivial portion of voters, those with the least interest in the outcomes, did see a time opportunity cost

Political Science Association, on file with the *New York University Journal of Legislation and Public Policy*) (noting that inaccessible polling places are an obstacle to voting generally).

276. See, e.g., ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 265 (1957) (arguing that “time is the principal cost of voting”); Bruce E. Cain, *The Internet in the (Dis)service of Democracy?*, 34 LOY. L.A. L. REV. 1005, 1010 & n.15 (2001) (attributing to Downs the “original idea” that “the costs of voting will usually swamp the perceived likelihood of casting the decisive vote”); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2139 (1996) (noting that Downs “is credited with first recognizing the paradox” of voting).

277. See Stein & Vonnahme, *supra* note 275, at 6.

278. See *id.* at 15.

279. *Id.* at 10–11.

280. *Id.* at 13.

281. See *infra* notes 286–90 and accompanying text.

282. See *supra* notes 258–59 and accompanying text.

to participating.²⁸³ Gimpel and Schuknecht then examined data for three Maryland suburban counties near Washington, D.C. to determine the effect of distance and “impedance” on turnout. Relying on the literature of transportation planners, Gimpel and Schuknecht defined polling place “accessibility” as a function of distance and impedance, with impedance defined as:

[W]hatever stands in the way of getting from point A to point B, and can be measured in a variety of ways, such as speed limits, residential density and accompanying traffic congestion, number of major intersections one must traverse on the way, or topographical barriers such as rivers or steep terrain. Distance is not necessarily a problem. . . if there is no impedance. A polling location may be six miles away, but if there is no traffic congestion or other barriers between one’s home and the precinct place, distance may not stand as a significant barrier. On the other hand, impedance might not matter much if the distance is so short that overcoming barriers between two points is a relatively costless effort.²⁸⁴

Gimpel and Schuknecht found that (1) turnout rates were highest where the distance to the polling place was very short or very long and (2) impedance, particularly residential density, acted as a barrier to turnout.²⁸⁵ Because of voters’ continuing social preference for low density, single family housing, Gimpel and Schuknecht concluded that encouraging turnout would require moving polling sites closer to housing and multiplying the number of sites and precincts.²⁸⁶ Because their paper analyzes traditional precinct data based on residence, it does not necessarily contradict either the early data in favor of vote centers (allowing voting near places of work, errands, etc.) or the interim prescription we focus on: honoring out-of-precinct provisional ballots. Their conclusions may run counter to our suggestion that precinct area footprints be increased to lower the friction of out-of-precinct provisional ballots, but they are consistent with our underlying point that current precinct structure likely is not supported by careful analysis by the governmental entities creating those boundaries.

Building on the Gimpel and Schuknecht work, Moshe Haspel and H. Gibbs Knotts analyzed data for turnout and distance from residence

283. See J.G. Gimpel & J.E. Schuknecht, *Political Participation and the Accessibility of the Ballot Box*, 22 POL. GEOGRAPHY 471, 474–75 (2003).

284. *Id.* at 476.

285. *Id.* at 481, 484. See also Joshua J. Dyck & James G. Gimpel, *Distance, Turnout, and the Convenience of Voting*, 86 SOC. SCI. Q. 531, 535, 539–42 (2005) (finding similar patterns in Clark County, Nevada).

286. Gimpel & Schuknecht, *supra* note 283, at 485.

to polling place for a mayoral race in Atlanta.²⁸⁷ Haspel and Knotts also sought to differentiate distance into walking distance for those voters close enough to walk to the polls, driving distance for those beyond walking distance, and vehicle availability for those needing to drive.²⁸⁸ Controlling for other variables, Haspel and Knotts found that distance had a significant effect on turnout, with a predictably higher sensitivity to distance when cars are not available to voters.²⁸⁹ They also found that, in certain areas, splitting precincts had a positive effect on voter turnout, despite any confusion that might arise from changing a voter's previous polling location.²⁹⁰ Like the Gimpel and Schuknecht studies, they address our propositions only to the extent that they concern increasing precinct footprints.

Henry Brady and John McNulty have analyzed the consolidation of polling places in Los Angeles County that occurred for the 2003 gubernatorial recall in California.²⁹¹ The election's abrupt scheduling meant that the county did not have a lot of time to prepare for the recall.²⁹² One of its shortcuts was to consolidate precincts from 5,231 precincts in the 2002 general election down to 1,885 for the recall, with the average voter distance to the poll rising from 0.348 miles to 0.502 miles.²⁹³ Brady and McNulty found that consolidation reduced polling place turnout substantially in the precincts where the polling place was changed.²⁹⁴ However, the reduction was partially offset by absentee voting, primarily by middle-aged and older voters.²⁹⁵ They also tested two possible causes for the reduced turnout: a transportation effect (distance from the polling place) and a disruption effect (composed of information needed to learn the new location and risk aversion to traveling to a new neighborhood). They found that the

287. M. Haspel & H. Gibbs Knotts, *Location, Location, Location: Precinct Placement and the Costs of Voting*, 67 J. POL. 560 (2005).

288. *See id.* at 565. The authors did not consider poll accessibility to public transportation on the ground that most Atlantans lived within one mile of the polling place and that buses ran infrequently. *Id.* at 565 n.6.

289. *See id.* at 567.

290. *See id.* at 569.

291. *See* H.E. Brady & J.E. McNulty, *The Costs of Voting: Evidence from a Natural Experiment 2-3* (2006) (unpublished manuscript, on file with the *New York University Journal of Legislation and Public Policy*).

292. The announcement for the October 7 recall election was made on July 24, 2003. *See Rene Sanchez & William Booth, Vote on Calif. Governor's Recall to Be Oct. 7*, WASH. POST., July 25, 2003, at A.04; Bob Egelko & Zachary Coile, *Difficult Questions Remain on Recall: U.S. Review, Pending Federal Cases Could Alter Election Timing*, S.F. CHRON., Aug. 20, 2003, at A11.

293. *See* Brady & McNulty, *supra* note 291, at 3, 8.

294. *Id.* at 22.

295. *See id.* at 3, 19, 22.

disruption effect was much larger than the transportation effect until the increase in distance reached one mile; at that point, the effects were equal.²⁹⁶ Interestingly, they noted that the consolidation actually shortened the distance to the polls for those who had to travel more than 0.65 miles to the polling place in 2002.²⁹⁷

As is the case in other studies of polling place location, Brady & McNulty's analysis is based on residence. We can see the type of sophisticated study that is needed not only to support effective consolidation but also to support the existing precinct structures. The fact that no academic literature existed until these recent efforts is likely indicative of the lack of analytical underpinnings for the design of existing precinct structures.

While the movement toward vote centers offers a permanent solution to the artificial frictions caused by precincts, the slow pace of the adoption of vote centers does not guarantee any short-term or medium-term relief. The inertia of the status quo will leave most of us in the anachronistic world of precincts for the foreseeable future. Consolidation, whether in the form of increasing the area footprint of precincts or through replacing precincts with jurisdiction-wide vote centers, immediately creates the anxiety that voting will be less convenient and therefore a further suppressant to turnout.

V.

CONCLUSION

The HAVA motives to increase the centralized control of registration and elections are not novel. Joseph Harris wrote in 1929 that "[c]entral administrative supervision in the place of legislative enactments would go far toward improving and toning up the conduct of elections and registrations."²⁹⁸

The 2000 election meltdown in Florida that spurred Congress into action clearly demonstrated that poorly maintained registration records, overworked and under-financed local election offices, and frequent relocations of precinct boundaries and polling places—which often occur right before the election—conspire to create confusion on

296. *See id.* at 3–4, 22.

297. *See id.* at 12–13. Brady and McNulty also suggested some factors to consider when consolidating precincts: (1) changing the polling place for precincts with higher fractions of absentee voters, who would not be affected by consolidation; (2) avoiding changing the polling place for precincts with more elderly voters; (3) changing the polling place for smaller precincts, so that fewer voters would have to go to a new location; and (4) taking into account the preexisting distance to the polling place. *See id.* at 15.

298. HARRIS, REGISTRATION OF VOTERS, *supra* note 50, at 24.

election day. Specifically, these factors combine to: (1) direct some portion of the voters to the wrong polling location, where of course their names will not appear on the registration rolls thereby denying these voters their right to vote (absent provisional ballots); or (2) furnish outdated or incomplete registration lists to polling places on election day, potentially excluding from voting some who registered to vote on or near the registration deadline.²⁹⁹ Congress clearly had the 2000 election in mind when it created legislation requiring that provisional ballots be made available to all voters whose registration is challenged.³⁰⁰ Before HAVA, an estimated two to four million eligible voters did not have their votes counted as a result of errors attributable to registration and polling place errors.³⁰¹

HAVA's objective was simple: to guarantee that otherwise eligible voters would never again be deprived of their right to cast their votes *and* their right to have them counted. Put another way, if the office charged with processing registration application forms, updating registration information when people move, notifying people of where to vote, designating polling places, training poll workers, and ensuring that polling places have the most up-to-date registration rolls failed in any of these critical tasks, thereby triggering on election day the question of a voter's eligibility, the eligible voter should not be penalized by losing his or her right to vote for federal candidates in that election.

We are well aware of the various ambiguities in the wording of HAVA, having been involved in its passage.³⁰² We are acutely familiar with the compromises that were necessary for its enactment. We believe the better reading of the ambiguities surrounding section 302(a)(4) is that Congress intended that state law eligibility to vote in the jurisdiction, not the precinct, should be the standard for counting HAVA provisional ballots.

299. See *supra* note 108 and accompanying text.

300. Congress expressly relied on the 2001 Ford-Carter Commission, which recommended provisional balloting as a way to prevent future disenfranchisement of the type that occurred in 2000. See *supra* notes 92–94 and accompanying text; N.Y. State Citizens' Coalition on HAVA Implementation, Position Paper on Voter Registration and Statewide Database 3 (Mar. 15, 2005) (on file with the *New York University Journal of Legislation and Public Policy*).

301. See CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 9 (2001), available at http://www.vote.caltech.edu/media/documents/july01/july01_VTP_Voting_Report_Entire.pdf (counting a total of four to six million lost votes overall in the 2000 election, including a loss of 1.5 to two million votes from faulty equipment and confusing ballots).

302. See authors' biographies in introductory footnotes.

Information errors at the polling place can be expected to decline sharply in the next few years as states create cleaner state-wide computerized registration rolls and improve training for poll workers. But such errors will never completely disappear; provisional ballots will continue to be an important fail-safe option for eligible voters whose registration has been called into question. Thus, the importance of forgiving and lenient treatment of provisional ballots cast by otherwise eligible voters cannot be overstated. Clean statewide lists (only achievable through the strong state control mandated by HAVA), liberal provisional ballot counting rules (so that voters are not penalized for the faults of election administrators), and rational and uniform definitions of precincts will do much to reduce the disharmony experienced in 2000 and again in 2004.

TABLE 4: STATUTORY PRECINCT REQUIREMENTS:
MAXIMUM PEOPLE PER PRECINCT

Alabama	None	District of Columbia	None
Alaska	None		
Arizona	None. A county's board of supervisors must establish a "convenient number of election precincts" in the year before a general election. ARIZ. REV. STAT. ANN. § 16-411(A) (2005).	Florida	None
		Georgia	Maximum of 2,000 electors if there is a line of more than 1 hour at poll closing in the previous election. GA. CODE ANN. § 21-2-263 (2006).
Arkansas	None	Hawaii	None
California	Maximum of 1,000 voters per precinct. CAL. ELEC. CODE § 12223(a) (West 2006) ("The precinct boundary shall be fixed in a manner so that the number of voters in the precinct does not exceed 1,000 on the 88th day prior to the day of election.").	Idaho	None
		Illinois	In counties with a population greater than 3 million, ideal precinct size of 500 with maximum of 800. 10 ILL. COMP. STAT. ANN. 5/11-2 (West 2003).
Colorado	1,500 active eligible electors if the county uses an electronic or electromechanical voting system. COLO. REV. STAT. § 1-5-101(3) (2005).	Indiana	General rule: precincts should have no more than 1,200 active voters. IND. CODE ANN. § 3-11-1.5-3(a) (Lexis-Nexis 2006).
Connecticut	None		
Delaware	500 to 3,000 registered voters per election district "except where such composition would cause a conflict with representative, senatorial or councilmemberic boundary lines." DEL. CODE ANN. tit. 15, § 4105(a) (2004)		

	Exceptions: where precincts include entire townships, city legislative bodies, or single residential structures with more than 1,200 active voters, the maximum is 1,500 active voters. IND. CODE ANN. § 3-11-1.5-3(b) (LexisNexis 2006); if a precinct was established with 1,200 active voters within the last 4 years and the population has grown, then the number of active voters may exceed the 1,200 limitation as long as the precinct does not have more than 1,400 voters. IND. CODE ANN. § 3-11-1.5-3(c) (LexisNexis 2006).	Mississippi	None in practice; maximum of 500 qualified electors. Limitation does not apply if voting machines are used in all elections in that precinct. MISS. CODE ANN. § 23-15-285 (West 2003).
		Missouri	None
		Montana	None. MONT. CODE ANN. § 13-3-101(2) (2005) ("The governing body of each county shall establish a convenient number of election precincts, equalizing the number of electors in each precinct as nearly as possible.").
Iowa	Maximum of 3,500 total population. IOWA CODE ANN. § 49.3(1) (West 2006).	Nebraska	Maximum of 1,000 registered voters based on number of voters voting in last state-wide general election; minimum of 75. NEB. REV. STAT. § 32-903(1) (2005).
Kansas	None		
Kentucky	Maximum of 1,500 registered voters (State Board of Elections may choose to withhold expenses from precincts that exceed the 1,500 limit, except for precincts that use optical scan voting machines and periods of time in which precinct boundaries are frozen under § 117.056; State Board may also review of boundaries of precincts with more than 700 votes cast. KY. REV. STAT. ANN. § 117.055(2) (LexisNexis 2004).	Nevada	If a precinct uses paper ballots, maximum of 600 registered voters; if a precinct uses a mechanical voting system, maximum of 1,500 registered voters not designated inactive. NEV. REV. STAT. § 293.207(1) (2005).
		New Hampshire	None
		New Jersey	None. Election districts have a maximum based on use of voting machines but no maximum for precincts. N.J. STAT. ANN. § 19:4-11(a) (West 1999) ("Each election district in which only one voting machine or four electronic system voting devices are used shall contain no more than 750 voters, except an election district in which there is located a public or private institution where persons entitled to vote may reside, and in such district the number of voters shall be as near to 750 as is practicable.").
Louisiana	Maximum of 2,200 registered voters; minimum of 300 registered voters (with some exceptions). LA. REV. STAT. ANN. § 18:532B.(3), (4)(a) (2004).		
Maine	None		
Maryland	None		
Massachusetts	Maximum of 4,000 inhabitants. MASS. GEN. LAWS ANN. ch. 54, § 2, 6 (West 1991).		
Michigan	Maximum of 2,999 registered voters. MICH. COMP. LAWS ANN. § 168.661 (West 2005).	New Mexico	Maximum of 800 votes cast in person in last general election. N.M. STAT. ANN. § 1-3-1.B. (LexisNexis 2003).
Minnesota	None		

New York	Maximum 950 registrants (excluding inactive registrants) but with permission of county Board of elections maximum can be increased to 1,150 (excluding inactive registrants). N.Y. ELEC. LAW § 4-100 (3)(a) (McKinney 1998).	Utah	Maximum of 1,250 active voters. UTAH CODE ANN. § 20A-5-303(2)(a) (2006).
		Vermont	None
		Virginia	Maximum of 5,000 registered voters; minimum of 100 registered voters in a county precinct, 500 registered voters in a city precinct. VA. CODE ANN. § 24.2-307 (2003).
North Carolina	None		
North Dakota	None		
Ohio	Maximum of 1,400 electors. OHIO REV. CODE ANN. § 3501.18 (West 2006).	Washington	If the precinct uses voting machines or electronic voting devices, maximum of 900 active registered voters. WASH. REV. CODE ANN. § 29A.16.040(3) (West 2005).
Oklahoma	None		
Oregon	Maximum of 5,000 electors. OR. REV. STAT. § 246.410 (2006).		
Pennsylvania	Maximum of 1,200 registered electors, absent good cause for more. 25 PA. STAT. ANN. § 2702 (2006).	West Virginia	Urban center precincts: maximum of 1,500 registered voters; minimum of 300 registered voters. Rural precincts: maximum of 700 registered voters; minimum of 200 registered voters. W. VA. CODE ANN. § 3-1-5(a) (LexisNexis 2005).
Rhode Island	"Substantially not more" than 1,900 voters per polling place, and not less than 150 voters per polling place. R.I. GEN. LAWS § 17-11-1 (2003).	Wisconsin	Cities of at least 150,000: maximum of 4,000 inhabitants per ward (minimum of 1,000). Cities of 39,000 to 150,000: maximum of 3,200 inhabitants per ward (minimum of 800). Cities of 10,000 - 39,000: maximum of 2,100 inhabitants per ward (minimum of 600). Wis. STAT. § 5.15(2) (2004).
South Carolina	Maximum of 1,500 qualified electors. S.C. CODE ANN. § 7-7-710 (2005).		
South Dakota	None		
Tennessee	Maximum of 5,000 registered voters, whenever practicable and where the precinct uses voting machines. TENN. CODE ANN. § 2-3-103 (2005).		
Texas	"A county election precinct must contain at least 100 but not more than 5,000 registered voters." In some cases, the minimum may be less than 100. TEX. ELEC. CODE ANN. § 42.006 (Vernon 2006).	Wyoming	Not more than 30 election districts per county. WYO. STAT. ANN. § 22-7-101 (2005).